84-928

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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ABBEY NURSING HOME, INC.,
AND MAX A. STRAUSS,

PETITIONERS

-vs-

ESTATE OF ALMA RICHARDSON,
VERNEDA BENTLEY, ADMINISTRATRIX,

RESPONDENT

ON WRIT OF CERTIORARI
TO THE OHIO EIGHTH DISTRICT
COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is it a violation of Article VI, Cl. 2, the "Supremacy Clause" of the Constitution of the United States, for a state, through its courts, to refuse to enforce Federal statutory law, specifically the subrogation provisions of 42 U.S.C. §1396a(a)(25)(C), found in Title XIX of the Social Security Act, by refusing to give effect to the state statute carrying out the requirements of Federal law, in this case, O.R.C. §5101.58?

2. Where, in a civil case, the courts of a state deny a party thereto the benefit of those well-settled statutory and common-law rules governing substantive proof and trial procedure which are ordinarily and regularly applied in similar disputes before such courts, does such state action constitute a denial of that party's rights under the Fourteenth Amendment to the

Constitution of the United States, to Due Process of Law and Equal Protection of the Laws?

3. Where this Court has decided that in cases seeking redress for alleged violations of an individual's liberty interest in safety in an institution supported by Federal funds, a decision regarding such safety, if made by a professional (which includes a person competent, whether by education, training, or experience, to make the particular decision at issue) is presumptively valid and liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such a judgment, may a state court impose such liability without first requiring proof of (a) the accepted professional judgment, practice, or standard, and (b) the departure therefrom?

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OPINIONS BELOW

Denial of Motion to Certify in the
Supreme Court of Ohio
Ohio Supreme Court Case No. 84-711
September 12, 1984

Denial of Motion for Rehearing in the
Supreme Court of Ohio
Ohio Supreme Court Case No. 84-264
May 23, 1984

Denial of Motion to Certify in the
Supreme Court of Ohio
Ohio Supreme Court Case No. 84-264
April 18, 1984

Estate of Alma Richardson,
Verneda Bentley, Administratrix
Ohio Eighth District Court of Appeals
Cuyahoga County, Unreported, Case No. 46126
May 7, 1984

Estate of Alma Richardson,
Verneda Bentley, Administratrix
Ohio Eighth District Court of Appeals
Cuyahoga County, Unreported, Case No. 46126
December 19, 1983

Denial of Motion to Certify in the
Supreme Court of Ohio
Ohio Supreme Court Case Nos. 81-1453, 81-1454
November 25, 1981

Estate of Alma Richardson,
Verneda Bentley, Administratrix
Ohio Eighth District Court of Appeals
Cuyahoga County, Unreported,
Case Nos. 42156 and 42168 (Consolidated)
July 9, 1981

JURISDICTIONAL STATEMENT

The date of the judgment or decree of the Ohio Supreme Court sought to be reviewed is September 12, 1984. The dates of the judgments or decrees rendered in the Ohio Court of Appeals are December 19, 1983, as amended on March 7, 1984.

The statutory provision believed to confer upon this Court jurisdiction to review the judgment or decree in question by Writ of **Certiorari** is 28 U.S.C. §1257(3), which permits review of final judgments rendered by the highest court of a state in which a decision could be had, where the validity of a statute of the United States is drawn into question, and where a right is claimed under the Constitution and statutes of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of Article VI, Cl. 2 of the United States Constitution, the "Supremacy Clause", which provides:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This case further involves the application of the Due Process and Equal Protection clauses of Amendment XIV to the Constitution of the United States, which provide, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Finally, this case involves the application and enforceability by state courts of 42 U.S.C. §1396a(a)(25), which is set forth in the Appendix hereof at Exhibit S.

STATEMENT OF THE CASE

On June 1, 1974, defendant, Abbey Nursing Home, Inc. ("Abbey"), leased a duly-licensed multi-

story nursing home facility from Midtown Nursing Home at 8205 Euclid Avenue, in Cleveland's inner city. Upon leasing this building, Abbey undertook a comprehensive, $700,000.00, five-year plan to improve and remodel its interior structure. This renovation, done floor by floor, produced dust and routine construction debris in the areas where work was proceeding. Therefore, Abbey moved all patients from floors on which work was proceeding to unoccupied beds on other floors to avoid their exposure to dust. While the construction process made it impossible for Abbey's exterminator to keep the facility insect-free at all times, Abbey increased the frequency of his visits from monthly to weekly in an attempt to do so. Nursing homes in Ohio, such as Abbey, are subject to stringent State regulation and control. (**See**, Ohio Revised Code Annotated [Page's, 1983] Chapter 3721.)

At all times, Abbey employed the number of nursing personnel required by State law. Through these employees, it provided around-the-clock,

residential nursing care and other services to its residents -- three meals and a snack each day, transportation to and from the hospital for clinic appointments, planned social activities, laundry services, social counseling, and various other services. For these services, the State of Ohio paid $23.22 per day for most patients; the bulk of Abbey's residents being supported by Medicaid.

Plaintiff's decedent, Alma Richardson, voluntarily entered Abbey on February 3, 1978, and remained there until June 19, 1978, when her family abruptly removed her. Upon discharge, she was taken by her granddaughter (Ms. Bentley) and her daughter (Mrs. Lee) to the Emergency Room at University Hospital, where she was examined by a young intern, Donald Goodfellow, M.D.

Dr. Goodfellow noted that Mrs. Richardson had a partial paralysis of her left side; a bruise on her left shoulder-upper arm area; two small, superficial abrasions on her left thigh; and a rash, which he likened to diaper rash, beneath her left

breast. Dr. Goodfellow renewed prescriptions for Mrs. Richardson's long-standing illnesses and advised her family to apply warm compresses to the bruise on her arm, talcum powder to her rash, and to assure that she rested adequately. Mrs. Richardson was then taken to her daughter's home and, a few days thereafter, to her granddaughter's home. After nine months of around-the-clock efforts by Ms. Bentley and her pre-adolescent children to provide the care they felt Mrs. Richardson needed, the latter died on April 2, 1979 from malnutrition and dehydration.

In August, 1978, the instant action was filed in Mrs. Richardson's name, in Cuyahoga County, Ohio Court of Common Pleas, Case No. 988159, alleging that she had been assaulted, battered, and negligently cared for by Abbey's staff, its Administrator (appellant Strauss), and her attending physician, Branimir Horvat, M.D.

The first trial of this case commenced in the Court of Common Pleas of Cuyahoga County, Ohio in

February, 1980. During the course of that trial, plaintiff stipulated that the entire cost of Mrs. Richardson's stay at Abbey and the major part of the health care expenses incurred due to her alleged injuries were paid for with Medicaid funds, provided under Title XIX of the Social Security Act (42 U.S.C. 1396, **et seq.**). This trial resulted in a jury verdict for plaintiff in the amount of $3,188.00. This verdict was appealed by both sides to the Ohio Eighth District Court of Appeals; Case Nos. 42156 and 42168. In reversing the judgment and remanding the case to the trial court for a new trial, the Court of Appeals premised its determination upon a multi-faceted denial to defendants of their due process right to a fair determination of the issues presented, including their right to equal protection of the law as one constituent of "due process". In that opinion, tne Court denied to defendants the benefit of the following common law rules, **inter alia:**

a) the rule requiring expert opinion testimony in cases involving the alleged negligence of a professional;

b) the rule rendering hearsay testimony, as to which no exception applies, incompetent as evidence to prove the truth of the matter asserted in the declarant's statement;

c) the rules requiring:

(i) medical opinion testimony on the issue of proximate causation between alleged negligence and claimed injury;

(ii) proof of the reasonableness of amounts claimed as special damages, medical in nature;

(iii) proof of physical or pecuniary harm as a required element on an assault claim;

(iv) proof of purposeful or intentional conduct as a predicate for submission to the jury of a claim for punitive damages;

(v) affirmance of an assignment of error presented, where the record failed to include a

transcript of all trial court proceedings pertinent thereto;

(vi) that a trial court's discretionary determinations not be disturbed upon appeal in the absence of an appellate finding of an abuse of such discretion; and

(vii) that a judgment of reversal not be entered where no prejudice to the appellant has been demonstrated.

The foregoing deprivations of equal protection of the laws by the Court of Appeals were promptly objected to through a Motion for Reconsideration, filed in the Appellate Court on July 20, 1981, which stated:

> Now comes the defendant, Abbey Nursing Home, Inc., by its attorneys and, pursuant to Rule No. 26 of the Ohio Rules of Appellate Procedure, and the 'Due Process Clause' of the Fourteenth Amendment to the United States Constitution (U.S. Const., Amend. XIV, §1), respectfully requests that this Honorable Court of Appeals reconsider its 'Journal Entry and Opinion' dated July 9, 1981 in the within appeals.

> In support of this application, defendant respectfully points out to the Court that the said 'Journal Entry and Opinion' is premised upon manifold jurisprudential irregularities which are so glaring and gross as to negate the possibility that same were produced by ordinary human error, simple inadvertence, or accidental misapprehension of the facts of record previously presented; by reason whereof, defendant's constitutional right to 'Due Process of Law' before this Court has been effectively denied. [Footnote omitted.]

After the Supreme Court of Ohio refused to take jurisdiction of a further appeal of this decision (Ohio Supreme Court Case Nos. 81-1453 and 81-1454, Motion to Certify overruled 11-25-81) [Appendix Exhibits J-M], the case was remanded to the Court of Common Pleas of Cuyahoga County, to be retried under the "law" as set forth in the Court of Appeals' opinion.

Upon such remand, and as a result of the discovery in the course of the first trial that a portion of the medical expenses claimed by plaintiff as special damages was paid for by Federal funds under Title XIX of the Social Security Act, defen-

dants filed, on January 7, 1982, a Motion for Partial Summary Judgment as to the issue of damages, raising plaintiff's and the Court's failure to follow the State statute implementing 42 U.S.C. §1396a (a)(25), which mandates that State welfare agencies receiving Title XIX funds be reimbursed for such funds expended as a result of acts of third-party tortfeasors. This motion was overruled on February 16, 1982. The necessity of applying Federal law to this case, and the failure of the trial court to do so, was repeatedly raised thereafter in defendants' tendered jury instructions; in their post-trial Motion for Judgment Notwithstanding the Verdict; and upon appeal — all to no avail. The courts of Ohio consistently refused to follow and to apply Federal law herein, despite the constitutional mandate to do so.

On June 18, 1982, this Court decided **Youngberg v. Romeo**, 457 U.S. 307, first published in 50 U.S. L.W. 4681. In that case, at 50 U.S.L.W. 4684-4685 [457 U.S. 321-323], this Court held:

'. . . It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.' . . . In determining what is 'reasonable' . . . we emphasize that courts must show deference to the judgment exercised by a qualified professional. . . . Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions. . . . (Courts should not 'second guess the expert administrators on matters on which they are better informed.') For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such judgment. In an action for damages against a professional in his individual capacity, however, the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability.

* * *

By 'professional' decision-maker, we mean a person competent, whether by education, training or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing. . . . Of course, day-to-day

> decisions regarding care — including decisions that must be made without delay — necessarily will be made in many instances by employees without formal training but who are subject to the supervision of qualified persons. [Emphasis added.]

The foregoing rule of law enunciated by this Court was urged upon the trial court in defendants' Trial Brief, filed July 1, 1982, at pp. 6-7 thereof:

> In its decision herein, our Court of Appeals held that plaintiff's claims of professional negligence in providing decedent with allegedly substandard nursing care could properly be submitted to the jury in the absence of any expert's testimony as to (i) **what** the standard of care was, and (ii) whether defendant's conduct was in accordance with that standard. Such holding is, clearly, the law of this case for purposes of re-trial. On **June 18, 1982,** however, the United States Supreme Court held that proof of the specific standard of care in issue should be adduced in cases such as this, but also established a **presumption of the validity** (**i.e.,** correctness) of daily care decisions made by doctors and nurses for patients in long-term custodial care institutions. . . .
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> * * *
>
> **Youngberg v. Romeo,** ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed. ___, 50 U.S.L.W. 4681, 4684-4685 (1982).

> The Supreme Court specifically included nursing judgments in the protected category of professional decisions. . . . [Emphasis in the original.]

However, the trial court chose not to apply the law as propounded by this Court, overruling a Motion for Directed Verdict made at the close of all of the evidence; which motion was squarely predicated upon plaintiff's failure to meet the evidentiary standards set forth in **Youngberg, supra.** (Transcript of the record, at pp. 1894-1896.) [Appendix, Exhibit I.]

Because the trial court chose to follow the "law of the case" as enunciated by the Ohio Eighth District Court of Appeals rather than the subsequent decision of this Court in **Youngberg**, no expert opinion evidence was offered of any specific duty defendants owed to plaintiff's decedent, breach of any such duty, or of the proximate cause of any of the injuries supposedly sustained by said decedent. Further, expert opinion testimony offered during defendants' case-in-chief on these

same issues, was excluded by the trial court on the basis that same was irrelevant. On this, and on numerous other issues, the trial court, as a result of its obedience to the Appellate Court's prior decision, as well as a marked predilection toward the plaintiff generally, acted to deny to the defendants their fundamental right to defend themselves in a manner consistent with the settled usages of the common law in Ohio.

In the re-trial, the jury returned a verdict against Petitioners for Seventy-Five Thousand Dollars ($75,000.00) compensatory damages, and Three Hundred Thousand Dollars ($300,000.00) as punitive damages. [**See**, Appendix, Exhibit H.] Following a remittitur of One Hundred Twenty-Five Thousand Dollars ($125,000.00) of the punitive damage award [**see**, Appendix, Exhibits F and G], Petitioners appealed to the Ohio Eighth District Court of Appeals, setting forth errors which were committed by the trial court which denied Petitioners a fair trial, including the issues raised herein.

Such errors were raised in Petitioners' Assignments of Error Nos. 1-10 and 12, filed April 21, 1983, and Petitioners' Assignments of Error Nos. 1-10 and 13, filed June 17, 1983. A divided Court of Appeals affirmed the judgment of the trial court. [**See**, Appendix, Exhibit E.] A Notice of Appeal as of right and a Memorandum in Support of Jurisdiction to the Ohio Supreme Court were filed, with the issues raised herein specifically set forth as error in Propositions of Law Nos. 3 and 4 in such Memorandum. (Ohio Supreme Court Case No. 84-264.)

Subsequently, upon the determination of a motion requesting the Court of Appeals to certify the case to the Ohio Supreme Court, and while the appeal to the Supreme Court was pending, the Ohio Court of Appeals, **sua sponte**, modified its opinion on the basis of "clerical error" by retracting a separate concurring opinion of one of the two Court of Appeals judges who voted for affirmance. [**See**,

Appendix, Exhibt D.] A second Notice of Appeal as of right to the Ohio Supreme Court was filed from the **nunc pro tunc** entry withdrawing such separate concurring opinion, with supporting Memorandum in Support of Jurisdiction, on May 1, 1984. (Ohio Supreme Court Case No. 84-711.) Thereafter, the Ohio Supreme Court, **sua sponte,** dismissed the first appeal "for the reason that no substantial constitutional question exists herein" (Ohio Supreme Court Case No. 84-264) [**see,** Appendix, Exhibit C], and a Motion for Rehearing in the Ohio Supreme Court was overruled. [**See,** Appendix, Exhibit B.]

On July 3, 1984, a Motion for Leave to Amend the Memorandum in Support of Jurisdiction in Ohio Supreme Court Case No. 84-711, seeking to incorporate into that appeal the Propositions of Law raised in 84-264, was filed. This motion was never ruled upon by the Ohio Supreme Court. On September 12, 1984, the Supreme Court of Ohio, **sua sponte,** dismissed the second appeal "for the reason that no

substantial constitutional question exists herein". [See, Appendix, Exhibit A.]

In this Petition, this Court is asked to reverse the judgment of the Court of Appeals on the grounds that:

a) same constitutes a violation of the Supremacy Clause of the United States Constitution;

b) same constitutes a denial to Petitioners of their right to a fair trial as guaranteed by the Due Process Clause and the Equal Protection Clause of the United States Constitution; and

c) same failed to apply the Law of the Land as clearly and explicitly set forth in a prior published decision of this Court, to the disparagement of the rights of Petitioners to a fair trial.

REASONS FOR GRANTING THE WRIT

A. Is it a violation of Article VI, Cl. 2, the "Supremacy Clause" of the Constitution of the United States, for a state, through its courts, to refuse to enforce Federal statutory law,

specifically the subrogation provisions of 42 U.S.C. §1396a(a)(25)(C), found in Title XIX of the Social Security Act, by refusing to give effect to the state statute carrying out the requirements of Federal law, in this case O.R.C. §5101.58?

The obligation imposed upon **state courts** by the Supremacy Clause to enforce Federal laws is absolute. **Claflin v. Houseman,** 93 U.S. 130, 137 (1876); **Testa v. Katt,** 330 U.S. 386, 391 (1947); **Lee v. Florida,** 392 U.S. 378 (1968). The assistance of a state court in the violation or "skirting" of a Federal law is equally prohibited, and no state legislature, state agency, or state court possesses the power to alter Federal social welfare legislation or regulations, or to fail to enforce same, without violating Article VI, Cl. 2 **Snider v. Creasy,** 548 F. Supp. 601 (D.C. Ohio 1982); **Terjesen v. Terjesen,** 420 So. 2d 704 (La. App. 1982).

In **Lee v. Florida**, this Court reversed a state court's refusal to enforce §605 of the Federal Communications Act, holding, at 385-386:

> But the decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity'. **Elkins v. United States**, 364 U.S. 206, 222. Under our Constitution, no court, state or federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States', laws by which 'the Judges in every State [are] bound. . . .' [Footnotes omitted.]

And, in **Testa v. Katt**, the Court, in reversing the Rhode Island court's refusal to enforce §205(e) of the Emergency Price Control Act, stated, at 390-391:

> The opinion of a unanimous court in that case [**Claflin v. Houseman, supra**] was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any Thing in the Constitution or laws of any State to the Contrary

> notwithstanding'. It asserted that the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide. And the Court stated that 'If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court.' **Id.** at 137. And see **United States v. Bank of New York,** 296 U.S. 463, 479. [Footnotes omitted.]

In the instant case, plaintiff included in her claim for recovery certain health care expenses, allegedly necessitated by her decedent's claimed injuries. However, the Ohio Department of Public Welfare and/or the Cuyahoga County Welfare Department — not decedent — paid substantially all of the costs of same through funds provided under the Medicaid program.

Defendants timely brought such fact to the attention of the trial court by their motion for partial summary judgment, and by their subsequent motion to dismiss for failure to join an indispensable party. Both motions were overruled. The

point was raised again in defendants' motion for judgment notwithstanding the verdict, which also was overruled. The trial court's actions in overruling these motions was clear error. More importantly, such refusal by the trial and appellate courts below to enforce a Federally-mandated right of subrogation not only constitutes a violation of Article VI, Cl. 2 of the United States Constitution, the "Supremacy Clause", but also jeopardizes Ohio's entitlement to receive any further Federal funding for its Medicaid program.

The Medicaid program, found in Title XIX of the Social Security Act, provides Federal funds on a matching basis to state public welfare programs which meet the requirements of the Act, for payment of the cost of medical services to the aged, indigent, disabled, and to dependent children. Subsection (C) of 42 U.S.C. §1396a(a)(25), which requires as a condition for receiving Federal funding, the states to "seek reimbursement for such assistance to the extent of such legal liability", **mandates**

that the states be subrogated to the plaintiff-recipient's claim, to the extent of medical assistance payments received. Thus, in order to receive such Federal matching funds, Ohio enacted O.R.C. §5101.58, entitled "Right of Subrogation", which provides, in pertinent part:

> No settlement, compromise, judgment, or award or any recovery in any action or claim by a recipient where the departments have a right of subrogation shall be made final without first giving the appropriate departments notice and a reasonable opportunity to perfect their rights of subrogation.

The passage by Congress of 42 U.S.C. §1396a(a)(25)(C) **required** the State of Ohio, as a condition precedent to the receipt of Medicaid funds, not only to **enact** R.C. §5101.58, but also to **enforce** it. The state and county welfare departments have an absolute **obligation** to make the effort to recover Medicaid funds expended from liable third-party tortfeasors; the alternative thereto being either: (a) a cutoff of Medicaid funds to the **entire** State of Ohio; or (b) acceptance of a legal

theory which permits Ohio to insist that it possesses a right to Medicaid funding by the Federal Government without first complying with the Federally-mandated prerequisites for receipt of same. The first of these alternatives has not yet occurred, but it may occur if the Ohio courts' orders refusing to enforce R.C. §5101.58 go unreversed.

The second alternative is clearly repugnant to Article VI, Cl. 2 of the Constitution of the United States.

The Congress of the United States, in furtherance of the salutary public policy protecting the limited resources of social welfare programs from being drained as the result of the acts of culpable third parties, has decreed that the state agencies spending those social welfare funds recoup same from such tortfeasors. While the Ohio Legislature has carried out its responsibility in enacting the necessary enabling legislation, the conduct of the courts of Ohio in this case has resulted in a judi-

cial nullification of both the Congressional mandate and the State-enacted enabling law. In order, therefore, that the "Supreme Law of the Land" continues to be recognized as such in Ohio, the actions of the Ohio courts in refusing to enforce 42 U.S.C. §1396a(a)(25)(C) must be reversed.

B. Is it a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and, therefore, a denial of Due Process and of Equal Protection of the laws for the courts of a state, in a civil case, to deny a party thereto the benefit of those well-settled statutory and common law rules governing substantive proof and trial procedure which are ordinarily and regularly applied in similar disputes before such courts?

In the trial of any civil suit instituted to take a defendant's property (viz., money), said defendant is constitutionally entitled to the benefit of those well-settled statutory and common-law

rules governing substantive proof and trial procedure which are ordinarily and regularly applied in similar disputes before our courts, as opposed to being required to have the case against him determined under arbitrary and capricious concepts of "law" created on an **ad hoc** basis for the sole purpose of permitting jury "determination" of a legally-deficient claim.

This Court, in the case of **Chicago, Burlington & Quincy Railroad Co. v. Chicago**, 166 U.S. 226, 228, 234-235 (1897), stated:

> The questions presented on this writ of error relate to the jurisdiction of this court to reexamine the final judgment of the Supreme Court of Illinois, and **to certain rulings of the state court which, it is alleged, were in disregard of that part of the Fourteenth Amendment declaring that no State shall deprive any person of his property without due process of law, or deny the equal protection of the laws to any person within its jurisdiction.**
>
> * * *
>
> Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice

of the proceedings for condemnation, appeared in court, and was admitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice — the court having jurisdiction of the subject matter and of the parties, and the defendant having full opportunity to be heard -- met the requirement of due process of law. **United States v. Cruikshank**, 92 U.S. 542, 554; **Leeper v. Texas**, 139 U.S. 462,468. **But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment.** In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' **Davidson v. New Orleans**, 96 U.S. 97, 102. **The same question could be propounded, and the same answer should be made, in reference**

> to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that amendment.1/ [Emphasis added.]

The "Due Process" clause of the Federal Constitution (U.S. Const. Amend. XIV, §1) and the "due course of law" clause of the Ohio Constitution [Ohio Const. (1851) Art. I, §16] are analytically the same. 17 Ohio Jur. 3d **Constitutional Law** §649 at p. 184. And, according to the Ohio Supreme Court in **Hoel, supra,** at note 1, both of such constitutional provisions require that courts accord **all** litigants a resolution of their disputes **in**

1/ **Accord, Roberts v. New York City,** 295 U.S. 264, 277 (1935); **Chicago Junction Case,** 264 U.S. 258, 265 (1924); **Chambers v. Bureau of Unemployment Compensation,** 30 Ohio Op. 1 (Franklin Com. Pl. 1944), **aff'd.,** 146 Ohio St. 559 (1946); **Baltimore & O.R. Co. v. United States,** 5 F. Supp. 929 (N.D. Ohio 1933); **State ex rel. Hoel v. Brown,** 105 Ohio St. 479, 485-486 (1922).

accordance with the settled usage of the common law and "the regular and established course of judicial proceedings". Obviously, where, as here, a court violates any litigant's right to have such a proceeding, that litigant has not only been denied "due process", but also his right to the equal protection of those rules of state law which are regularly applied by our courts to similarly-situated litigants in like cases; for, "Equality of justice demands that in any controversy, the rights of all parties be scrupulously maintained."2/

Appellants' submit that the concept of due process in court proceedings necessarily incorporates the "equal protection" requirement that all litigants in like cases be accorded the same trial rights and procedures available in their jurisdiction. At page 1186 of **The Constitution of the United States of America, Analysis and Interpreta-**

2/ **LaFrance Co. v. Elec. Workers,** 108 Ohio St. 61, 95 (1923). **See also,** 17 Ohio Jur. 3d **Constitutional Law** §628 at p. 150.

tion, Legislative Reference Service, Library of Congress (U.S. Gov't. Printing Office, Wash. D.C. 1964), the principle is explained as follows:

> **Equality.** If due process is to be secured, the laws must operate alike upon all, and not subject the individual to the arbitrary exercise of governmental power unrestrained by established principles of private rights and distributive justice. Where a litigant has the benefit of a full and fair trial in the State courts, **and his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition,** he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result. [Emphasis added.]

Accord, 16A Am. Jur. 2d (Rev.) **Constitutional Law** §791 at pp. 931-933.

The record of the second trial herein reveals that defendants-appellants were repeatedly, systematically, and deliberately denied by the trial court of their rights to have the benefit of applicable rules of substantive and procedural law applied to them in the same manner to which all litigants in the courts of Ohio are entitled.

For example, the record of the re-trial in this cause reveals refusals by the trial court to:

(a) permit a verbatim stenographic record to be made of all of the trial proceedings;

(b) accord the parties' counsel reasonable opportunity to be heard in defense of their clients' rights;

(c) require plaintiff to establish as a fact, through the testimony of one or more experts in defendant's profession, the specific duties which defendant allegedly owed, and whether one or more of such duties was breached;

(d) permit defendants to adduce, through the testimony of experts in their professions, what the specific duties owed to plaintiff were, and that none of such duties was breached;

(e) permit a defendant, defending against a claim of liability premised upon the allegation that his servant battered plaintiff, to adduce evidence of such servant's good reputation for "peace and good order" in his defense;

(f) admit evidence proving that his adversary's witness had made a prior statement inconsistent with such witness's subsequent testimony at trial;

(g) permit a party to adduce relevant, probative evidence in support of his claim or defense; or

(h) charge the jury upon the issue of punitive damages that, in order to prevail upon such issue, plaintiff must prove that defendant's(s') alleged conduct must have been intentional and deliberate, or have the character of outrage frequently associated with crime.

Each of such refusals violates a well-settled, fundamental substantive or procedural right, established by statute, rule, or binding decisional precedent, which is routinely respected by courts of Ohio in civil cases. Yet, the appellate courts below — while unanimously agreeing that several of such constitutional rights violations occurred — refused to reverse the judgment so produced.

This Court has, on at least one previous occasion, taken the State of Ohio to task for such a wholesale denial of due process in an adjudicative proceeding. In **West Ohio Gas Co. v. Public Utilities Commission of Ohio**, 294 U.S. 63, 67-69 (1935), this Court stated:

> 1. The company made claim to an allowance for 'unaccounted for gas', which is gas lost as a result of leakage, condensation, expansion or contraction.
>
> * * *
>
> The company, basing its claim upon its proved experience, reported the average loss as 9% per annum. The Commission fixed the allowance at 7%, thereby reducing the operating expenses by $3,800 a year.
>
> * * *
>
> A public utility will not be permitted to include negligent or wasteful losses among its operating charges. The waste or negligence, however, must be established by evidence of one kind or another either direct or circumstantial. In all the pages of this record, there is neither a word nor a circumstance to charge the management with fault. **Cf. Ohio Utilities Co. v. Public Utilities Commission of Ohio**, 267 U.S. 359, 363.

> There is not even the shadow of a warning to the company that fault was imputed and that it must give evidence of care. **Without anything to suggest that there was such an issue in the case, the Commission struck off 2%; it might with as much reason have struck off 4 or 6. This was wholly arbitrary. Ohio Utilities Co. v. Public Utilities Commission of Ohio, supra.**
>
> Under the statutes of Ohio no provision is made for a review of the order of the Commission by a separate or independent suit. The sole method of review is by petition in error to the Ohio Supreme Court, which considers both the law and the facts. **Dayton P. & L. Co. v. P. U. Commission of Ohio,** 292 U.S. 290, 302; **Hocking Valley Ry. Co. v. Public Utilities Commission,** 100 Ohio St. 321, 326, 327; 126 N.E. 397. **To make such review adequate, the record must exhibit in some way the facts relied upon by the court to repel unimpeached evidence submitted for the company. If that were not so, a complainant would be helpless, for the inference would always be possible that the court and the Commission had drawn upon undisclosed sources of information unavailable to others. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.** [Emphasis added.]

Here, as in **West Ohio Gas Co., supra,** a series of wholly arbitrary denials of fundamental rights of appellants resulted in a constitutionally-

inadequate hearing. The record in this case presents this Court with the situation described in **Roberts v. New York City, supra,** at 277:

> To bring about a taking without due process of law by force of such judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action.

The arbitrary action of the trial court in this case resulted in a judgment depriving appellants of $275,000 worth of their property without due process of law. This affront to our Constitution must not be permitted to stand unredressed.

C. Where this Court has decided that in cases seeking redress for alleged violations of an individual's liberty interest in safety in an institution supported by Federal funds, a decision regarding such safety, if made by a professional (which includes a person competent, whether by education, training or experience, to make the particular decision at issue) is

presumptively valid, and liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment, may a state court impose such liability withour first requiring proof of (a) the accepted professional judgment, practice, or standard, and (b) the departure therefrom?

In this case, plaintiff's decedent received residential nursing care and services in defendants' nursing home (which is a State-regulated industry[3/]); which care was paid for with Federal funds distributed under the Medicaid Act, 42 U.S.C. §1396, **et seq.**, through the Ohio and Cuyahoga County Welfare Departments. Plaintiff's claim in

---

3/ **See**, Ohio Revised Code (Pages) Chapter 3721; Ohio Administrative Code, Ch. 3721.

this case is that the damages sustained by her decedent were caused by such care and services being provided in a substandard manner.

In the case of **Youngberg v. Romeo**, 457 U.S. 307, this Court, in deciding what a plaintiff, whose care in a state-supported institution was alleged to be substandard, must prove, held at pp. 321-323:

> We think the standard articulated by Chief Judge Seitz affords the necessary guidance and reflects the proper balance between the legitimate interests of the State and the rights of the involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints. He would have held that 'the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.' 644 F. 2d, at 178. Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish. **Cf. Estelle v. Gamble**, 429 U.S. 97, 104 (1976). At the same time, this standard is lower than the 'compelling' or 'substantial' necessity tests the Court of Appeals would require a state to

meet to justify use of restraints or conditions of less than absolute safety. We think this requirement would place an undue burden on the administration of institutions such as Pennhurst and also would restrict unnecessarily the exercise of professional judgment as to the needs of residents.

Moreover, we agree that respondent is entitled to minimally adequate training. In this case, the minimally adequate training required by the Constitution is such training as may be reasonable in light of respondent's liberty interests in safety and freedom from unreasonable restraints. In determining what is 'reasonable' -- in this and in any case presenting a claim for training by a state -- we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized.' **Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions.** See **Parham v. J. R.**, 442 U.S. 584, 607 (1979); **Bell v. Wolfish**, supra, 441 U.S. at 544 (**Courts should not 'second-guess the expert administrators on matters on which they are better informed.'**) **For these reasons, the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure**

> **from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.** In an action for damages against a professional in his individual capacity, however, the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability. See note 12, **supra.** [Emphasis added.]

And, in note 30 to the foregoing text, this Court held:

> By 'professional' decision-maker, we mean a person competent, whether by education, training or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded. Of course, day-to-day decisions regarding care -- including decisions that must be made without delay -- necessarily will be made in many instances by employees without formal training, but who are subject to the supervision of qualified persons.

See also, Denny Jenkins v. United State of America, No. 82-1082 (D.D.C., filed April 28, 1983) at pp. 2-4. [Appendix, Exhibit T.]

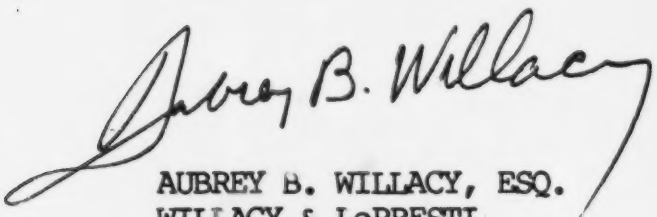
The decision in **Youngberg, supra,** was rendered by this Court during the pendency of the appeal from the first trial of this action. The rule set forth above from the case was brought to the attention of the trial court prior to the re-trial, and of every Ohio appellate court thereafter. The Ohio courts have uniformly refused, however, to give effect to this Court's decision in **Youngberg.** Rather, the Court of Appeals of Cuyahoga County, Ohio decided, in both appeals of this case, that no competent (**viz.,** expert) proof of a substantial departure from accepted professional judgment need be adduced in order to hold the professionals involved herein and their corporate employer liable in damages. Further, in the re-trial of this case, the defendants were not even permitted to introduce evidence of this nature to **defend** against the claim. This decision was affirmed on appeal. These rulings by the courts of Ohio, made after this Court announced its decision in **Youngberg, supra,** are in clear conflict with that decision.

The impact of such conflicting decisions will be to subject defendants, and similarly-regulated, Federally-supported facilities, to a wider scope of liability than this Court has heretofore determined to be permissible, with the accompanying potential for Federal funds, intended to purchase a minimal level of nursing services, being expended on damage awards. Such conflicting decisions of the courts of Ohio must be brought into line with the decisions of this Court.

CONCLUSION

Upon any or all of the foregoing reasons, Petitioners respectfully request that this Honorable Supreme Court grant a writ of **certiorari** to the Court of Appeals of Ohio, Eighth Appellate District, to review and decide the questions presented herein.

Respectfully submitted,



AUBREY B. WILLACY, ESQ.
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700 Western Reserve Bldg.
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Cleveland, Ohio 44113
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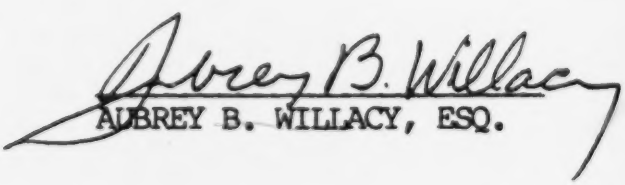
COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

A copy of the foregoing **Petition for Writ of Certiorari** has been sent by regular U. S. Mail, postage prepaid, to Counsel for Respondent, Nicholas M. DeVito, Esq., Nicholas M. DeVito & Assoc., 1000 Terminal Tower, Cleveland, Ohio 44113, this 7th day of December, 1984.



AUBREY B. WILLACY, ESQ.

84-928

No.

Office - Supreme Court, U.S.
FILED
DEC 7 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ABBEY NURSING HOME, INC.,
AND MAX A. STRAUSS,

PETITIONERS

-vs-

ESTATE OF ALMA RICHARDSON,
VERNEDA BENTLEY, ADMINISTRATRIX,

RESPONDENT

ON WRIT OF CERTIORARI
TO THE OHIO EIGHTH DISTRICT
COURT OF APPEALS

APPENDIX

AUBREY B. WILLACY, ESQ.
COUNSEL OF RECORD FOR PETITIONERS
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ATTORNEYS FOR PETITIONERS

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A	Order Denying Motion to Certify in the Supreme Court of Ohio, Case No. 84-711
B	Order Denying Rehearing in Ohio Supreme Court, Case No. 84-264
C	Order Dismissing Appeal in Ohio Supreme Court, Case No. 84-264
D	Order and Opinion Denying Motion to Certify in Ohio Court of Appeals, Case No. 46126
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J	Order Denying Motion to Certify in Ohio Supreme Court, Case No. 81-1453
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T	**Denny Jenkins v. United States of America**, No. 82-1082 (D.D.C., filed April 28, 1983, Unreported)

THE SUPREME COURT OF OHIO
COLUMBUS
1984 TERM
To Wit: September 12, 1984

Estate of Alma Richardson, Verneda Bentley, Adm'x., Appellee,	:	Case No. 84-711
v.	:	MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS
Abbey Nursing Home, Inc., et al., Appellant.	:	for Cuyahoga County to CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS: Motion Fee, $20.00, paid by William E. Peelle.

FOR YOUR
INFORMATION ONLY
NOT FOR FILING

FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

_____ Clerk

_____ Deputy

EXHIBIT A

May 25, 1984

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO	)	1984 TERM
	)	
City of Columbus.	)	To wit:
	)	May 23, 1984
Estate of Alma Richardson,	)	
Verneda Bentley, Adm'x.,	)	No. 84-264
Appellee,	)	
	)	REHEARING
vs.	)	
	)	
Abbey Nursing Home, Inc.,	)	
et al.,	)	
Appellants.	)	

It is ordered by the court that rehearing in this case is denied.

I, JAMES WM. KELLY, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said court, to wit, from Journal No. 60 Page 483.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 23rd day of May, 1984.

/S/ James Wm. Kelly, Clerk

By _____ Deputy

EXHIBIT B

THE SUPREME COURT OF OHIO

THE STATE OF OHIO	)	1984 TERM
	)	
City of Columbus.	)	To wit:
	)	April 18, 1984
Estate of Alma Richardson,	)	
Appellee,	)	No. 84-264
	)	
vs.	)	
	)	
Abbey Nursing Home, Inc.,	)	APPEAL FROM THE
et al.,	)	COURT OF APPEALS
Appellants.	)	for Cuyahoga County

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and no motion to dismiss such appeal having been filed, the Court **sua sponte** dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

EXHIBIT C

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 18th day of April, 1984.

James William Kelly, Clerk

/S/ by Harold Moore, Deputy

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 46126

ESTATE OF ALMA RICHARDSON, VERNEDA BENTLEY, ADM'X., etc.,	)	
Plaintiff-Appellee,	)	JOURNAL ENTRY AND OPINION ON MOTION TO CERTIFY, MOTION FOR CONSIDERATION EN BANC, AND MOTION TO TAX COST
vs.	)	
ABBEY NURSING HOME, INC., et al.,	)	
Defendant-Appellants.	)	

DATE OF ANNOUNCEMENT OF DECISION: March 6, 1984

CHARACTER OF PROCEEDING: Civil Appeal from Common Pleas Court Case No. 78-988159

JUDGMENT: Motions Overruled

DATE OF JOURNALIZATION: March 6, 1984

APPEARANCES:
COUNSEL FOR APPELLANTS: Aubrey B. Willacy
Willacy & LoPresti
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1468 West Ninth Street
Cleveland, Ohio 44113

EXHIBIT D

Louis H. Orkin
Weiner, Orkin, Abbate, Suit
24200 Chagrin Boulevard
Beachwood, Ohio 44122

COUNSEL FOR APPELLEES: Nicholas M. DeVito
1000 Terminal Tower
Cleveland, Ohio 44113

GREY, J.:

Defendant-Appellant filed a Motion to Certify this case to the Ohio Supreme Court on the grounds that the decision in this case is in conflict with other decisions of other Courts of Appeals. Defendant-Appellant also filed a motion to have the Motion to Certify considered **en banc**. Plaintiff-Appellee filed a Motion to Tax as Costs the expenses for the transcript.

The Motion to Certify is overruled. The Motion to Certify is based on several grounds, all of which, save one, were adequately considered in the Court's original opinion. The one issue raised which appears to have substance is the issue of the reliance on R.C. Chapter 3721 in Judge Grey's concurring opinion.

The opinion of Judge Dahling, the opinion of Judge Stillman concurring in part and dissenting in part, and the opinion of Judge Grey were drafted and circulated to all participating judges. Later when conferring on this case, it became apparent that R.C. Chapter 3721 was not applicable to the case. Judge Grey withdrew the concurring opinion and concurred in the opinion of Judge Dahling as written. Inadvertently, through clerical error, Judge Grey's concurring opinion was attached to the opinion released by the Court.

This Court now orders that the concurring opinion of Judge Grey, which has been inadvertently attached to the opinion released in this case, be stricken from the record and removed from the Court's opinion.

Based on the foregoing, the Motion to Certify is overruled.

The motion for consideration of the Motion to Certify by the Court **en banc** is overruled.

The Motion to tax the expenses of the transcript as costs is overruled.

MOTIONS OVERRULED

It is ordered that appellee recover of appellants its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

STILLMAN, J., Retired,
Of the Eighth Appellate District
Sitting by Assignment

DAHLING, J.,
Of the Eleventh District
Sitting by Assignment

/S/ LAWRENCE GREY, J.
Of the Fourth
Appellate District
Sitting by Assignment

RECEIVED FOR FILING: March 8, 1984
Gerald E. Fuerst, Clerk

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 46126

THE ESTATE OF ALMA RICHARDSON VERNEDA BENTLEY, Administratrix Plaintiff-Appellee vs. ABBEY NURSING HOME, INC., et al., Defendant-Appellants	JOURNAL ENTRY and OPINION

DATE OF ANNOUNCEMENT
OF DECISION: December 8, 1983

CHARACTER OF PROCEEDING: Civil appeal from the Common Pleas Court Case No. 78-988158

JUDGMENT: AFFIRMED.

DATE OF JOURNALIZATION: December 19, 1983

EXHIBIT E

APPEARANCES:

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For Defendant-Appellant:

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LOUIS H. ORKIN, ESQ.
WEINER, ORKIN, ABBATE & SUIT CO., L.P.A.
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Beachwood, Ohio 44122

DAHLING, J.,

This is an appeal from a judgment of the Common Please Court of Cuyahoga County in which after a trial by jury, judgment was rendered for plaintiff-estate of Alma Richardson in the sum of $75,000 compensatory damages and $300,000 punitive damages. The trial court granted a remittitur of $125,000 to reduce the punitive to $175,000. We affirm.

Appellant, Abbey Nursing Home, Inc., operates a nursing home in the inner city at 8205 Euclid Ave., Cleveland, Ohio. The premises were in gross disrepair when purchased in 1974. Abbey undertook to make repairs over a give year period. Strauss is the Administrator of Abbey. For brevity, both defendants will be referred to as Abbey.

On February 3, 1978, Alma Richardson was admitted to Abbey. She was

partially paralyzed from several strokes, could not feed herself and was incontinent.

On June 19, 1978, she was taken by ambulance to University Hospital. The family was asked to wash her before the doctor would examine her. Dr. Goodfellow observed a large bruise on her left arm, abrasions on her thigh, and a diaper-like rash under her breasts. Bruises were also observed on her buttocks.

Conditions at Abbey were deplorable. Bed linens were dirty, patients were tied to chairs with bed sheets, patients were sitting in their waste. The utensils were dirty. Cockroaches were prevalent, rats were in the building, and flies were in the food.

As to Alma Richardson, she was seen sitting in her own stool, had the dirt, bruises, and diaper rash previously

discussed. Also, two patients, a male and a female, attempted to sexually abuse her. There was evidence she had been struck. On on occasion, she fell from a potty chair and suffered bruises and lacerations.

In February, 1980, the matter was tried to a jury. Both parties appealed and plaintiff was granted a new trial. The second trial was held in July, 1982.

*ASSIGNMENT OF ERROR NO. I

Abbey contends the court reporter did not record certain bench conferences prior to ruling. However, Abbey has not demonstrated how it was prejudiced.

Thie assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. II

Here, Abbey argues the court interrupted counsel, jumped from topic to

* See Appendix.

topic, was sarcastic and rude. Again, Abbey has not pinpointed where it was prejudiced.

This assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. III

In this assignment of error, the court should have required plaintiff to put on nursing home experts to testify as to the standards of care in operating a nursing home.

The evidence in this case was of gross, deplorable conditions, total lack of supervision, and both abuse and neglect of plaintiff. Expert testimony is not required where the matter is one of common knowledge. Jones v. Hawkes Hospital of Mt. Carmel, 175 Ohio St. 503 (1964).

* See Appendix.

This assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. IV

Abbey argues that it should have been permitted to put on experts to testify as to the duties owed by a nursing home to a patient. This is the corollary of assignment of error no. III.

Common sense tells one that you should not beat up patients, permit them to be sexually abused, and have filthy conditions, rats and cockroaches. Could Abbey have found an expert who would have said this treatment is the way to run a nursing home. Nonsense.

This assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. V

Abbey wanted to question Fred Krizman on waiver of non-compliance with

* See Appendix.

nursing home standards.

This suit was about the deplorable conditions, lack of care, and abuse of plaintiff. For this reason, the subject of waiver was not germane.

This assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. VI

Abbey complains they could not cross-examine Mrs. Bentley on a statement she alledgedly made to the ambulance driver when Alma Richardson was removed from Abbey to University Hospital. The statement was: "When Physicians' Ambulance Service asked what she [Bentley] wanted them to do with her grandmother, she stated 'quote [sic] Do anything you see fit, cause I need the money anyhow.'"

* See Appendix.

Whether Mrs. Bentley (granddaughter of plaintiff) was motivated in bringing the suit for love of her grandmother or for the money is irrelevant. The statement, "Do anything you see fit, cause I need the money anyhow", does not make sense. What could the ambulance driver do that would make anyone some money? Abbey has not suggested an answer.

This assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. VII

Abbey claims that they should have been permitted to offer evidence of Mrs. Brooks' reputation for peace and good order. There was testimony that Brooks struck plaintiff in the face. However, plaintiff did not contend Brooks had a bad reputation. Since her reputation was

* See Appendix.

not at issue, it was not error to sustain the objection to character evidence.

This assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. VIII

Sharon Cummins was a plaintiff witness as to the abuse and neglect at Abbey. Defendant wished to present evidence that she had lied about her education to secure another job. However, since her first trial testimony was read in the second trial, Abbey did not have the opportunity to cross-examine Cummins about this inconsistency.

In the testimony of Cummins which was read to the jury she stated she did not have a master's degree. However, Abbey produced testimony that she had given a transcript to the Murtis H. Taylor Center that she had a masters

* See Appendix.

degree. This testimony was admitted. Also, Abbey was permitted to produce evidence that Cummins' reputation for truth and veracity was bad.

Since Abbey's skillful attorney was able to find another way to "skin the cat" there was no prejudice resulting from the objections which were sustained.

This assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. IX

Abbey complains that the court did not admit into evidence a report prepared in 1980 as to conditions at Abbey from 1976 to 1979. Plaintiff was a patient from February 3, 1978 to June 19, 1978. However, she was not a patient when the report was made.

A review of the report discloses it is based primarily on the conditions as

* See Appendix.

they existed on July 16, 1980. This was when Stewart made a visit to Abbey. In the report, he states:

> "* * *
> "It is apparent from an examination of records and from interviews with patients and with others that the number of complaints has been reduced in the past six-month period. This witness believes that the conditions in Abbey have been improved over the past year or so. A good part of this is, of course, attributable to the completion of the remodeling of the physical plant.
>
> On July 16, 1980 this witness called unannounced at Abbey. I asked Mr. Strauss to introduce me to the new Chairwoman of the Residents Committee, Frances Whitlock. Mr. Strauss left us after introducing her to me.
>
> She stated that smoking was a problem and that people would not restrict themselves to the permitted areas. Enforcement of rules pertaining to smoking has proven very difficult. She said that she had had no complaints from patients as to their privacy and that visitors and patients were given rooms to talk in.

* See Appendix.

She further said that (a) mail was distributed regularly; (b) there was no regular accounting to patients of their personal funds held by the home for them (however, on requests statements are given); (c) the home is kept clean; (d) the recreational programs were good; and (e) the care generally was good. The patients' complaints seem to be the same as noted above.

In response to my question she said that no one had been reprimanded, punished or in any way threatened for making complaints to her or at the regular weekly meetings of the Committee.

I then surveyed the entire home. I found the conditions to be the same as they were at the commencement of our examination. The linen was clean, no disagreeable odors, staff much in evidence and the facility was, at 4:30 P.M., neat.

I then talked with Mr. Strauss. He said he was still having some trouble keeping adequate, competent staff. His recruiting had to be mostly through agencies which added to expense but was necessary.

Although not exactly within the scope of this witness's assignment, I undertook to interview either in person but mostly by telephone approximately sixteen persons referred to me by the attorney for the plaintiff. Two persons having the most knowledge of Abbey are Sister Cassidy and Michael Rust, referred to above. Sister Cassidy kept a complete diary of her experiences and observations for a period commencing April 6, 1978 and continuing through April 15, 1978. It is interesting to note that the problems she encountered and observed at Abbey during the period are similar to those discussed by the Resident Council at its regular weekly meetings. In addition, she states in her report covering a period of April and May of 1978 that patients are not aware of the money paid to Abbey for their account and that no accounting is given to patients for it. She also states that there is a real fear of reprisal if complaints are made. She feels that those who have relatives receive better care than those who do not.

I understand that Sister Cassidy, who was instrumental in bringing this action, feels that things are improving at

> Abbey but that it has a long way yet to go. She states that some patient care is good and some not good."

The conclusion of Stewart's report is as follows:

> "It is apparent that Abbey has experienced many problems in the past. During the period from January of 1977 to date most of those problems have been cured or have significantly improved.
>
> I cannot see in the areas of my responsibility but that the Home is attempting to provide adequate care for the persons in its custody. It is true that there are problems and complaints, but they are not too different from those encountered in most health care institutions."

In summary, the report does not attempt to cover problems in 1978 but instead focuses on the conditions in July, 1980. At this point, conditions were not too bad in Stewart's opinion. However, the report does mention there is still the problem of liquor being slipped

into Abbey and the help is undependable.

It was proper for the report to be excluded since it was not based on the proper time span. However, it is difficult to see how Abbey would have benefited from this report since it emphasizes that the place is slowly improving.

This assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. X

Abbey objects to the following jury form:

> "The jury in this case, being duly empaneled and sworn, upon the concurrence of the undersigned Jurors, being not less than three-fourths of the whole number thereof, do find for the Plaintiff in the sum of $_____ and against the Defendants, ABBEY NURSING HOME, INC. and MAX STRAUSS.
>
> We do further find in favor of the Plaintiff in the sum of $_____ as punitive damages."

* See Appendix.

The primary objection is that the jury is left with the alternative of a verdict for or against both Abbey and Strauss. Also, the punitive award is only by inference against both Abbey and Strauss.

It would have been clearer to have specified which defendants the punitive was awarded against. However, there can be no mistake but that the punitive was awarded against both Abbey and Strauss.

In Schaller v. Chapman, 44 Ohio Law Abs. 631, 66 N.E. 2d 266 (1943), in an action for damages based upon an automobile accident, the court stated as follows:

> "It is our conclusion that the verdict as returned is clear and distinct and needs no explanation. Very distinctly it is a finding against both parties. Furthermore, we are unable to conclude that the verdict was contrary to law or

> manifestly against the weight of the evidence. ***" Schaller at Ohio Law Abs. at 636-37, 66 N.E. 2d at 269.

This assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. XI

Here, Abbey seems to be arguing that they did not know they could be socked for punitive damages for mistreating a patient. Obviously, this assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. XII

Abbey argues the Judge, Mr. Monagle, a retired judge, was somehow not qualified to hear the case. However, they have presented nothing from the Supreme Court to the effect he had not been properly assigned.

This assignment of error lacks merit.

* See Appendix.

*ASSIGNMENT OF ERROR NO. XIII

The contention is that the court lacked subject matter jurisdiction since the plaintiff failed to join the Ohio Department of Welfare.

The duty to join Ohio Department of Welfare does not apply since plaintiff did not seek to recover money paid to Abbey by these departments. R.C. §5101.58 states, in part:

> "No settlement, compromise, judgment or award or any recovery in any action or claim by a recipient where the departments have a right of subrogation shall be made final without first giving the appropriate departments notice and a reasonable opportunity to perfect their rights of subrogation." (Emphasis added)

Any expenses or damages claimed in this suit were only those suffered directly by plaintiff. As a result, the Ohio Department of Welfare has no right

* See Appendix

to subrogation. Finally, the Ohio Department of Welfare is not complaining.

This assignment of error lacks merit.

*ASSIGNMENTS OF ERRORS NOS. XIV AND XV

Abbey objects to the reading of the testimony of Dr. Goodfellow and Sharon Cummins from the first trial. Prior to trial, plaintiff moved the court for an order allowing the prior recorded testimony of Dr. Goodfellow and Sharon Cummins to be read to the jury. The basis was that both witnesses were out of state and unavailable for trial. The court granted the motion.

Evidence Rule 804(b)(1) allows former testimony as excepted hearsay provided the declarant is unavailable as

* See Appendix.

a witness. Evidence Rule 804(A)(5) sets forth an acceptable situation wherein a witness is "unavailable" and states, in part, as follows:

> "(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance ... by process or other reasonable means."

At the time of trial, Dr. Goodfellow had been transferred from a Cleveland area hospital to California and Sharon Cummins had moved to Texas. Plaintiff indicated to the court prior to its ruling that it was impossible to procure these witnesses' attendance for trial because their new address was unknown.

Abbey was not prejudiced since it had the opportunity and did cross-examine

* See Appendix.

these witnesses in the first trial.

These assignments of error lack merit.

*ASSIGNMENTS OF ERROR NOS. XVI, XVII, AND XVIII

Abbey argues that the court should have instructed the jury on assumption of risk, "volenti non fit injuria", and contributory negligence.

The evidence was that plaintiff was paralyzed, had to be fed, was double incontinent, and, of course, couldn't walk or take care of herself. There was no evidence to support Abbey's request for the charges.

These assignments of error lack merit.

* See Appendix.

*ASSIGNMENT OF ERROR NO. XIX

Abbey complains that the court did not charge the jury that plaintiff had admitted leaning forward in her wheelchair which could have caused the bruise.

The point missed by Abbey is that it was their responsibility to look after this paralyzed patient. If she went forward in her chair, she should not have been left in this position so long that her arm became bruised.

This assignment of error lacks merit.

*ASSIGNMENT OF ERRCR NO. XX

Abbey complains that the following evidence was irrelevant and inflamed the jury:

> "(a) that each of the nursing home's kitchens was ordered closed for brief periods,

* See Appendix.

although no harm to Alma Richardson connected therewith in any way was ever claimed, promised, or shown;

(b) that rats existed in and about the premises, although no harm to Alma Richardson therefrom was claimed;

(c) that cockroaches existed in and about the premises, although no harm to decedent due to same was claimed;

(d) that some toilet rooms upon the premises were unsightly, non-functioning, or unclean, although decedent was known to have only used a portable commode (i.e., 'potty chair') -- not any permanently affixed toilet;

(e) that the home did not evaluate decedent for physical therapy until about two months after her admission, although no harm to her therefrom was claimed and although her attending physician (named, but never served herein) was the only person having the right to order same;

(f) that some deranged patients sometimes stole others' food, although no harm to decedent therefrom was claimed;

(g) that two staff members allegedly fornicated on defendant's premises, on a date unknown, out of decendent's presence, although no harm to decedent therefrom was claimed and although neither of such staff members was shown to have been neglecting any need for care or attention on decedent's part at the time;

(h) that decendent's spending money account was charged $11.00 for a pair of slippers, although no claim for conversion, theft, or physical harm due to same was pleaded or proven;

(i) that efforts had been made to revoke the home's license and Medicaid certification, although the trial judge knew that the allegations upon which such attempts were based, had been determined to be meritless by the final decisions of other courts of competent jurisdiction;

(j) that the nursing home did not provide decedent with a supply of medications at the time of her discharge, although no harm to here therefrom was claimed;

(k) that decedent may not have been given full-body baths as frequently as plaintiff's counsel wished she should,

> although the medical evidence showed that such circumstance -- even if true -- could not have caused any of her alleged injuries, and
>
> (1) that unsuccessful attempts of sexual imposition were made towards decedent by other, apparently deranged, patients."

The testimony complained of presented to the jury the general conditions at Abbey. It showed a lack of persistence in solving the problems. If cockroaches cannot be eliminated by one extermination per month, then the service should be increased to once a week or if necessary twice a week. The bottom line is that the roaches "must go". The same pertains to rats and flies. Abbey simply did not realize that before the first patient spent a first night at Abbey that the roaches, rats, and flies had to be eliminated.

The same applies to other conditions. Until the nursing home, in general, was livable there should have been no patients. Until there were properly trained help and management, there should have been no patients.

If there had been proper concern for the patients these problems would not have existed and would not have continued to exist for several years. This case is, in part, concerned with the greed at Abbey and the lack of concern and care for patients.

The assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. XXI

Abbey claims the jury deliberated on Assault and Battery, although the third count of the complaint had been dismissed.

* See Appendix.

The court only instructed on negligence. The jury was advised that Evelyn Brooks, who allegedly assaulted plaintiff, had been dismissed as a party to the suit. The court states:

> "But I should tell you at this time, when we started this time, I told you that there were four Defendants in this case: There was Abbey Nursing Home, Max Strauss, Mrs. Pat Litowitz and Mrs. Evelyn Brooks.
>
> Now, as a result of these meetings, to which the Jury was not a part, the lawsuit is proceeding only against the Abbey Nursing Home and also against Max Strauss. There are no other Defendants you are going to have to consider in this case."

This assignment of error is without merit.

* See Appendix.

*ASSIGNMENT OF ERROR NO. XXII

Abbey complains that the court would not submit interrogatories to the jury.

The reasoning of the court was that the interrogatories did not test determination factors in the case. Abbey offered to revise the interrogatories if the court explained what would be acceptable. However, the court took the position that its sole duty was to rule on the interrogatories, not to help prepare Abbey's case.

The following discourse took place between Abbey's counsel and the court:

> "MR. WILLACY: In that case, Your Honor, is there any way that we can revise these so as to coincide to the Court's belief to a proper wording that -- I believe that under the Civil Rules, if there is a possibility of a revision being made, then the Court's

* See Appendix.

discretion is best exercised in that direction. The Defendants will be happy to revise these. I can have someone who can immediately go to the office and have them changed.

THE COURT: Lookit. You understand these interrogatories are submitted to the Jury, you understand, at the end of the instructions. What they will have initially is what requirements they have to consider in returning a general verdict. They will also be called upon to answer certain questions in the nature of interrogatories.

Before you start arguments, we will give you a few minutes more to shape up what it is that you expect the wordage to be, and we will review that. And if counsel wants to refer to it as joint argument, you can refer to it, as long as you can get them retyped and back in a shape that we consider satisfactory to be submitted to the Jury. What I am saying is we are not going to say what anybody has retyped.

MR. WILLACY: I understand that. My inquiry of the Court is exactly what the language that the Court feels is inappropriate?

THE COURT: It is your language, not mine. I didn't write these interrogatories.

MR. WILLACY: I understand that.

THE COURT: The Rules go on to say -- all we do is we say certain things can be done and certain things cannot be done. We don't get to the point of telling counsel what they should do.

MR. WILLACY: What I believe with regard to the interrogatories is that the interrogatoroies are to be submitted to the Jury in the form that the Court approves. I am inquiring of the Court what form the Court would approve.

THE COURT: I already said what my function is. Either I approve or disapprove what you submitted to me. So what you have submitted I disapproved."

This assignment of error is without merit.

*See Appendix.

*ASSIGNMENT OF ERROR NO. XXIII

Abbey has taken a single sentence out of the instructions and claims it was erroneous. However, in the total context of the instructions, the court made reference to proximate cause. The pertinent instruction was as follows:

> "Now, with respect to the claim as to recovery for what we refer to as compensatory damages, you are instructed that compensatory damages are those which would fairly and reasonably compensate a party for injuries suffered by reason of a wrongful act of another. If entitled to damages, a plaintiff should be allowed all that she actually suffered, which in no event exceeds the amount asked for by counsel.
>
> In determining the amount of damages, as to compensatory damages, you may and should consider the nature and extent and character of injuries suffered. You may also consider any pain or suffering that she had undergone, or she did undergo. You should also

*See Appendix.

> consider any medical expenses that were incurred for treating the injuries which were proximately caused by negligence of the Defendant.
>
> You will also have a right to consider any mental anguish or suffering and pain that she went through. Also consider all of the facts and circumstances appearing from the evidence that bear upon the question of damages.
>
> Now, in considering damages, you cannot consider any amount for the medical treatment or nursing care required by Mrs. Richardson for her pre-existing disabilities, nor from pain resulting from any pre-existing disabilities."

It is apparent that the court connected pain and suffering with proximate cause.

This assignment of error is without merit.

* See Appendix.

*ASSIGNMENT OF ERROR NO. XXIV

Abbey argues that the court should not have permitted Mrs. Dickey to testify that plaintiff stated she was hit by the lady with the red wig. Plaintiff was upset and crying when she told this to Mrs. Dickey:

> "* * *
> "A. She was crying, and she told me that the lady with the red wig that was up there had beat her."

This was pursuant to Evid. R. 803(2). The testimony was properly admitted. The testimony indicates that the statement was, "made while the declarant was under the stress of excitement caused by the event or condition," as an excited utterance.

This assignment of error is without merit.

* See Appendix.

*ASSIGNMENT OF ERROR NO. XXV

Abbey argues that it should have been granted a directed verdict. The basis appears to be that Abbey claims plaintiff needed expert medical or nursing home testimony.

In this case, the lack of care and mistreatment was of matters that were basic. For this reason, expert testimony was not required. Darnell v. Eastman (1970), 23 Ohio St. 2d 13.

This assignment of error is without merit.

*ASSIGNMENT OF ERROR NO. XXVI

In this argument of error, Abbey rambles through five pages of argument, hopping from one point to another. It appears the argument is that the judgment was excessive.

* See Appendix.

The plaintiff was subjected to mistreatment, neglect, and abuse. It was the callousness, and indifference of Abbey toward the invalid, helpless plaintiff. It was the insult to which she was subjected. It is difficult to put a dollar value on the mental suffering of the plaintiff.

Certainly $75,000 compensatory was not excessive. Likewise, the punitive award was justified.

This assignment of error is without merit.

*ASSIGNMENT OF ERROR NO. XXVII

Abbey argues that punitive damages could not be awarded unles its actions were intentional, deliberate, or outrageous.

* See Appendix.

Abbey's actions were intentional and deliberate from the point that they were unable to deal with or solve the multitude of problems with which they were confronted. However, they continued to accept incontinent, bedridden, helpless patients well knowing they could not provide a decent quality of care.

It can only be considered the utmost of greed that a provider would accept patients knowing they did not have proper facilities and could not give them care. Abbey's conduct was outrageous.

This assignment of error is without merit.

*ASSIGNMENTS OF ERROR NOS. XXVIII and XXIX

We have considered these assignments of error and find they are without merit.

* See Appendix.

*ASSIGNMENT OF ERROR NO. XXX

Abbey claims the verdict was against the manifest weight of the evidence.

At various points in this opinion, the evidence of abuse, neglect of care, deplorable conditions of the nursing home, filth, rats, cockroaches, closed kitchens, closed baths, patients sitting in urine and human waste were all referred to in detail.

The plaintiff entered the nursing home with no bruises. She left dirty, stinking, bruised, swollen, and with body rash. The judgment was supported by the manifest weight of the evidence.

"Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the

* See Appendix.

evidence." C.E. Morris Co. v. Foley Constr. Co. (1978) 54 Ohio St. 2d 179.

This assignment of error is without merit.

Attorney Louis H. Orkin filed additional assignments of error on behalf of Abbey. He began numbering the assignments of error at No. XXIX whereas his first assignment of error should have been No. XXXI. In this opinion, the additional assignments of error are numbered beginning with No. XXXI.

*ASSIGNMENT OF ERROR NO. XXXI

Abbey complains there was not a directed verdict granted on the issue of punitive damages.

The record discloses plaintiff's actual damages. It also discloses the intentional, deliberate and outrageous conduct of Abbey toward plaintiff.

* See Appendix.

This assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. XXXII

Abbey complains of the court's charge. Abbey states as follows:

> "* * * The trial court's charge to the jury was legally defective because the Court failed to instruct the jury that Appellant's actions must have been intentional and deliberate or have the character of outrage frequently associated with crime before punitive damages could be awarded. Moreover, the charge was legally defective because it permitted the jury to return a punitive damage award upon a mere showing of 'gross' negligence."

The charge was as follows:

> "Now, if you find for the Plaintiff and award actual damage, you may also consider whether you will separately award punitive damages. If you do not find actual damage, you cannot find punitive damage. Punitive damage is an amount which a Jury may but is not required to award as a punishment to discourage others

* See Appendix.

from committing similar unlawful acts. Punitive damage may be awarded only where a party intentionally and with actual malice injured another without lawful justification or excuse. Actual malice means anger, hatred, ill will, hostility toward another, or a spirit of revenge.

Now, actual malice under the law may be inferred from intentional, reckless, wanton, willful or gross acts which cause the injuries to the person of another. A plaintiff may recover punitive damages for negligence where the negligence is to gross as to show a reckless indifference to the rights and safety of other persons.

A principal's liability for willful and wanton and malicious acts does not extend to a liability in punitive damages unless the principal or master has authorized, ratified or acquiesced in and participated in an employee's conduct or has failed to exercise due and reasonable care in selecting or retaining such employee.

Now, if you award punitive damages, the amount should be fair and reasonable under all of the facts and circumstances, and should not be excessive, nor actuated by passion or

* See Appendix.

> prejudice. The amount of punitive damage rests in the sound judgment of the Jury and should be determined from all of the evidence in the case. If no amount is awarded for punitive damage, write the word "none" in lieu of an amount in the space provided."

The charge was not erroneous. This assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. XXXIII

Abbey complains that the punitive damage award was contrary to the manifest weight of the evidence.

Punitive damages may be awarded where the evidence demonstrates "wanton, willful, and gross acts" which support the conclusion of reckless indifference on the part of Abbey.

The record supports the above as well as outrageous conduct and insult.

This assignment of error lacks merit.

* See Appendix.

*ASSIGNMENT OF ERROR No. XXXIV

Abbey complains that the punitive damage award is out of line with the compensatory damage award. However, Abbey does not suggest what should have been the proper ratio.

The award of $175,000 punitive damages was not unreasonable considering the gross conduct of Abbey toward plaintiff. Also, the ratio of $175,000 to $75,000 is not so disproportionate that it bears no logical relationship.

This assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. XXXV

Abbey complains that the court permitted the allowance of attorney fees in the punitive damage award.

However, the court reduced the punitive damage award from $300,000 to

* See Appendix.

$175,000. Accordingly, Abbey was not prejudiced by the reference to attorney fees.

This assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. XXXVI

Abbey complains that the attorney fees were not valued out in the evidence. This assignment of error lacks merit for the reasons stated in assignment of error no. XXXV.

*ASSIGNMENT OF ERROR NO. XXXVII

Abbey complains the court should have granted a new trial on the issue of punitive damages.

The trial court reduced the punitive damage award from $300,000 to $175,000. Plaintiff has not complained.

The issue of whether $300,000 was excessive is not before this court.

* See Appendix.

However, the evidence supported a punitive damage award of $175,000. There was not an abuse of discretion.

This assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. XXXVIII

Abbey contends the verdict was the result of passion and prejudice.

A review of the record does not support this conclusion.

This assignment of error is without merit.

*ASSIGNMENT OF ERROR NO. XXXIX

The question of the verdict form has previously been considered.

This assignment of error lacks merit.

*ASSIGNMENT OF ERROR NO. XXXX

Abbey contends the award of punitive damages is violative of the due process

* See Appendix.

clause of Ohio and the United States Constitution.

The standards of conduct which will result in punitive damages have long existed. It should not have been a surprise to Abbey that mistreatment of a patient will result in punitive damages.

This assignment of error lacks merit.

Judgment affirmed.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant(s) her costs herein taxed. The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

STILLMAN, SAUL G., J.,
Retired, of the Eighth
District, Sitting by
Assignment, concurs in
part and dissents in part
with concurring and dissenting
opinion
GREY, LAWRENCE, J., of the
Fourth District Sitting by
Assignment, Concurs

Presiding Judge
ALFRED E. DAHLING, J.,
of the Eleventh Appellate
District, Sitting by
Assignment

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate . . . and it will become the judgement and order of the court and time period for review will begin to run.

RECEIVED FOR FILING December 8, 1983
Gerald E. Fuerst, Clerk

APPENDIX TO CASE NO. 46126

First Assignment of Error

The trial court violated defendants' rights to due process and committed prejudicial error by refusing to permit a verbatim stenographic record to be made of all of the trial proceedings; which refusal has undermined defendants' rights to obtain effective appellate review from this Court of Appeals.

Second Assignment of Error

The trial court violated defendants' rights to due process by refusing to accord their counsel reasonable opportunity to be heard in the defense of his clients' substantive and procedural rights.

Third Assignment of Error

The trial court violated defendants' rights to due process and committed prejudicial error by refusing to require plaintiff to establish as a fact -- by the testimony of one or more experts in the professions of nursing and nursing home administration -- the specific duties which defendants allegedly owed, and whether one or more thereof was, in fact, breached; by reason whereof the jury was required to speculate upon such issues.

Appendix (Cont'd)

Fourth Assignment of Error

The trial court violated defendant's rights to due process and committed prejudicial error by refusing to permit defendants to adduce, through the testimony of experts in the nursing profession, what the specific duties owed to a nursing home patient are and the fact that such duties as defendants owed were not breached; such refusal requiring the jury to speculate upon such issues.

Fifth Assignment of Error

The trial court violated defendants' rights to due process and committed prejudicial error by foreclosing defendants' right of cross-examination of Frederick Krizman with regard to Ohio Admin. Code §3701-17-34, which section established that certain licensure rules which plaintiff claimed defendants violated, do not constitute absolute standards of conduct; by reason of which foreclosure of cross-examination, the jury was misled with respect to the relevance of such licensure rules in this case.

Sixth Assignment of Error

The trial court violated defendants' rights to due process and committed prejudicial error by excluding from the evidence, a certain, theretofore-admitted memorandum contained within plaintiff's

Exhibit No. 52, wherein a prior, inconsistent statement made by Plaintiff Bentley was recorded; which retroactive exclusion was used to deprive defendants of their right of cross-examination of plaintiff.

Seventh Assignment of Error

The trial court violated defendants' rights to due process and committed prejudicial error by excluding certain oral testimony offered for the purpose of establishing that Abbey Nursing Home's employee, Evelyn Brooks, enjoyed a good reputation for "peace and good order"; which exclusion prejudiced defendants herein in their defense against plaintiff's claims of negligence in their hiring and/or retention of such employee and of vicarious liability for an alleged battery upon decedent by such employee.

Eighth Assignment of Error

The trial court violated defendants' rights to due process and committed prejudicial error by excluding from the evidence, the Murtis Taylor Center's personnel file on plaintiff's witness, Sharon Cummins; which file established that such witness was a practiced liar.

Appendix (Cont'd)

Ninth Assignment of Error

The trial court violated defendants' rights to due process and committed prejudicial error by excluding from the evidence, a certain composite report offered in accordance with O.R.C. §2317.36 et seq.; which report supported defendants' denials of negligence and rebutted plaintiff's claims insofar as damages are concerned.

Tenth Assignment of Error

The trial court violated defendants' rights to due process and committed prejudicial error by usurping the jury's prerogative to make individualized findings for such defendant upon the issues of liability and damages and by adding to the jury's defective punitive damage award, his own personal notion so to what the jury's intent was insofar as which defendant(s) was (or were) to be held liable for punitive damages.

Eleventh Assignment of Error

The trial court violated defendants' rights as litigants, under Article IV, §5 of the Ohio Constitution, to have their cause tried before a judge assigned to this case by random selection, as provided for in the Rules of Superintendence for the Court of Common Pleas, in that the "visiting judge" who presided over the proceedings below was

neither assigned to this case in the manner set forth in such Rules, nor otherwise authorized in the manner required by law to exercise jurisdiction over such case.

Twelfth Assignment of Error

The trial court lacked jurisdiction over the subject matter of the case and the parties thereto by reason of plaintiff's failure to join the Ohio Department of Welfare and the Cuyahoga County Welfare Department as parties herein, in accordance with the provisions of O.R.C. §5101.58 and Civil Rule 19(A).

Thirteenth Assignment of Error

The trial court committed error prejudicial to appellants in permitting the prior-recorded trial testimony of Donald Goodfellow, M.D., to be read to the jury where plaintiff offered no evidence of her inability to procure such witness's attendance upon re-trial by subpoena.

Fourteenth Assignment of Error

The trial court committed error prejudicial to defendants in permitting the prior-recorded trial testimony of Sharon Cummins to be read to the jury where plaintiff offered no sworn evidence

that, by reasonable diligence, such witness's presence at the second trial herein could not be obtained.

Fifteenth Assignment of Error

The trial court committed error prejudicial to defendants by refusing to instruct the jury on the defense of assumption of the risk where the facts adduced at trial showed that plaintiff's decedent did, in fact, assume such risk.

Sixteenth Assignment of Error

The trial court committed error prejudicial to defendants by refusing to instruct the jury on the defense of "volenti non fit injuria" where the facts adduced at trial showed that such defense was, in fact, substantiated by the evidence.

Seventeenth Assignment of Error

The trial court committed error prejudicial to defendants by refusing to instruct the jury on the defense of contributory negligence where the facts adduced at trial showed that plaintiff's decedent was, in fact, contributorily negligent.

Appendix (Cont'd)

Eighteenth Assignment of Error

The trial court committed error prejudicial to defendants by refusing to instruct the jury as to the law applicable to party admissions, where the facts adduced at trial showed that plaintiff's decedent did, in fact, make such an admission.

Nineteenth Assignment of Error

The trial court committed error prejudicial to defendants by repeatedly and frequently admitting incompetent and irrelevant evidence -- both documentary and testimonial -- offered by plaintiff.

Twentieth Assignment of Error

The trial court committed error prejudicial to defendants by permitting the jury to deliberate, and to hold defendants liable, upon the claim of "assault and battery", as pleaded in the third count of plaintiff's complaint, when such claim had theretofore been withdrawn by plaintiff; and, in conjunction therewith, by refusing to provide the jury with any instruction whatsoever as to the law applicable to such claim.

Appendix (Cont'd)

Twenty-First Assignment of Error

The trial court committed error prejudicial to defendants by refusing to submit their interrogatories to the jury.

Twenty-Second Assignment of Error

The trial court committed error prejudicial to defendants by instructing the jury that damages could be assessed against them for any mental anguish sustained by plaintiff's decedent during her stay at Abbey Nursing Home, as opposed to limiting defendants' liability in damages therefor to only such mental anguish as was directly and proximately occasioned by an injury sustained by decedent due to defendants' negligence.

Twenty-Third Assignment of Error

The trial court committed error prejudicial to defendants by admitting hearsay testimony regarding Alma Richardson's alleged accusations that Defendant Brooks, and other unknown, had beaten her, where such alleged extrajudicial statements were not made under any circumstance which might render some admissible.

Appendix (Cont'd)

Twenty-Fourth Assignment of Error

The trial court erred in refusing to direct a verdict for defendants at the close of plaintiff's case in chief where there was a total failure of proof by plaintiff upon the issues of duty, breach of duty, and proximate causation.

Twenty-Fifth Assignment of Error

The jury's verdict was grossly excessive and was the result of passion and prejudice against defendants, inflamed by repeated instances of misconduct on the part of counsel for plaintiff, with the support and condonation of the trial court.

Twenty-Sixth Assignment of Error

The trial court committed error prejudicial to defendants by overruling their motion for judgment notwithstanding the verdict.

Twenty-Seventh Assignment of Error

The trial court committed error prejudicial to defendants by overruling their alternative motion for a new trial.

Twenty-Ninth Assignment of Error

The trial court committed error prejudicial to appellants by failing to grant appellants' joint motion for a directed verdict favorable to appellants pursuant to Civil Rule 50(A) at the conclusion of appellees' case and at the conclusion of all the evidence on the issue of punitive damages.

Thirtieth Assignment of Error

The trial court committed error prejudicial to appellants in charging the jury on the issue of punitive damages for the reason that the charge was contrary to law and the court failed to charge the jury that appellants' actions must have been intentional and deliberate or have the character of outrage frequently associated with crime before punitive damages could be awarded.

Thirty-First Assignment of Error

The verdict of the jury awarding punitive damages to appellee is contrary to the manifest weight of the evidence, and such error was not cured when the trial judge granted a partial remittitur.

Thirty-Second Assignment of Error

The verdict and the judgment of the trial court awarding punitive damages to appellee are contrary to the manifest weight of the evidence inasmuch as the punitive damage award bears no reasonable relation or proportion to actual damage suffered as a proximate consequence of malicious conduct by appellants.

Thirty-Third Assignment of Error

The trial court committed error prejudicial to appellants when it failed to correctly charge the jury on the issue of attorney fees as punitive damages, and when it failed to set aside such award after the verdict was returned.

Thirty-Fourth Assignment of Error

The jury's verdict and judgment of the trial court awarding appellee attorney fees as punitive damages are contrary to the manifest weight of the evidence inasmuch as appellee failed to adduce evidence of the legal services performed and expert testimony of the reasonable value of such services.

Thirty-Fifth Assignment of Error

The trial court committed error prejudicial to appellants in overruling appellants' motion for a new trial on the

issue of punitive damages and such ruling constituted reversible error and a gross abuse of discretion by the trial court.

Thirty-Sixth Assignment of Error

The trial court committed error prejudicial to appellants in awarding punitive damages in favor of appellee for the reason that the verdict is excessive, contrary to law and predicated upon and influenced by passion and prejudice.

Thirty-Seventh Assignment of Error

The trial court committed error prejudicial to appellants by directing only one verdict form the jury for both appellants.

Thirty-Eighth Assignment of Error

The judgment of the trial court awarding punitive damages in favor of appellee violates appellant's right to due process of law guaranteed by the Ohio and the United States Constitution inasmuch as such judgment constitutes an unforeseeable and retroactive judicial expansion of the established Ohio Common Law, including the law of punitive damages.

COURT OF APPELS OF OHIO,
EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 46126

THE ESTATE OF ALMA RICHARDSON VERNEDA BENTLEY, ADMINISTRATRIX	)	
Plaintiff-Appellee	)	CONCURRING AND DISSENTING OPINION
vs.	)	
ABBEY NURSING HOME, INC., et al.	)	Dated December 8,
Defendants-Appellants	)	1983

STILLMAN, J. CONCURRING IN PART AND DISSENTING IN PART:

Although I concur in the judgment of this court with respect to the awarding of compensatory damages for the grievous mistreatment accorded to the patient by the Abbey Nursing Home, I find it respectfully necessary to dissent with respect to the punitive damages assessed.

Punitive damages "are generally defined or described as damages which are given in enhancement of compensatory damages on account of the wanton, reckless, malicious, or oppressive character of the acts complained of." Trainor v. Deters (1969), 22 Ohio App. 2d 135.

In the instant case, the nursing home was clearly guilty of gross negligence in the conduct of its operations, but this negligence was of a generalized nature in no way directed towards the patient involved here. The nursing home was filthy, the care indifferent, the conditions unsanitary. Nevertheless, all of this was in evidence openly visible to the family of the patient. They allowed her to remain in this environment for four and one-half months before taking action to remove

her from the premises. Nothing in the voluminous record demonstrates the type of gross negligence occasionally cited to justify punitive damages. Such gross negligence, in my view, must exemplify bad faith, or a conscious indifference to the rights or safety of the person affected. See 22 Am. Jur. 2d 345 (1965). Repulsive as the conduct of the appellants may have been in this case, I do not believe that this conduct warranted the award of punitive damages.

On the secondary level, I believe also that the verdict form used to allocate the punitive damages as between the Abbey Nursing Home and the individual defendant, its administrator, Max Strauss, is impermissibly vague. We do not know from this verdict whether or not the administrator is personally liable for the punitive damages or if the jury

sought to impose a divided liability.

For these reasons, I respectfully dissent from the punitive damages portion of the majority opinion.

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT

NO. 46126

THE ESTATE OF ALMA RICHARDSON VERNEDA BENTLEY, ADMINISTRATRIX	)	
Plaintiff-Appellee,	)	CONCURRING OPINION
vs.	)	
ABBEY NURSING HOME, Inc., et al.	)	Dated: December 8, 1983
Defendant-Appellants	)	

GREY, J. CONCURRING:

I concur in the judgment and opinion. I believe the dissenting opinion raises a valid point on the issue of punitive damages. I agree that punitive damages are not ordinarily allowed for negligence, even where the conduct is, as aptly described by the dissenting opinion, "repulsive." See Detling vs. Chockley (1982), 70 Ohio St. 2d 134. This is, and has been, a well

established common law rule.

However, in the case before us we are dealing with R.C. Chapter 3721, and R.C. 3721.10 thru .17, the so-called nursing home patients bill of rights. R.C. 3721.17(I) provides:

> "Any resident whose rights under sections 3721.10 to 3721.17 of the Revised Code are violated has a cause of action against any person or home committing the violation. The action may be commenced by the resident or by his sponsor on his behalf. The court may award actual and punitive damages for violation of the rights. The court may award to the prevailing party reasonable attorney's fees limited to the work reasonably performed."

Inasmuch as punitive damages are specifically allowed upon a violation of the patients statutory right to decent care, and inasmuch as the record in this case amply justifies such a finding, I concur in the opinion and the awarding of punitive damages.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ESTATE OF ALMA RICHARDSON,	)	CASE NO. 988159
	)	
Plaintiff,	)	JUDGE
	)	GEORGE McMONAGLE
vs.	)	
	)	
ABBEY NURSING HOME, INC., et al.,	)	JOURNAL ENTRY
	)	
Defendants.	)	

On the 22nd day of July, 1982, the jury in this case rendered a verdict in favor of plaintiff in the sum of Seventy-Five Thousand Dollars ($75,000.00) against defendants, Abbey Nursing Home, Inc. and Max Strauss, as compensatory damages and having further rendered a verdict in favor of plaintiff and against said defendants in the sum of Three Hundred Thousand Dollars ($300,000.00) as punitive damages. Judgment was entered in favor of plaintiff against said defendants, Abbey Nursing Home, Inc., and Max Strauss for Three Hundred

EXHIBIT F

Seventy-Five Thousand Dollars ($375,000.00) and costs of this action.

Subsequently, defendants timely filed a Motion for New Trial or, in the alternative, for a Motion for Judgment Notwithstanding a Verdict and for a Remittitur. The Court found defendants' Motion for a Remittitur to be well taken and determined the judgment with respect to punitive damages was excessive by One Hundred Twenty-Five Thousand Dollars ($125,000.00) although not the result of passion and prejudice.

(VOL 623 PG 764)

The plaintiff has acknowledged consent to a remittitur in the amount of One Hundred Twenty-Five Thousand Dollars ($125,000.00) with respect to punitive damages by plaintiff's counsel's signature hereto. Motion by the defendants for a New Trial or, in the alternative, for a Motion for Judgment Notwithstanding a Verdict is overruled.

IT IS THEREFORE ORDERED that judgment is rendered in favor of plaintiff in the sum of Seventy-

Five Thousand Dollars ($75,000.00) against defendants, Abbey Nursing Home, Inc. and Max Strauss, as compensatory damages and against said defendants in the sum of One Hundred Seventy-Five Thousand Dollars ($175,000.00) as punitive damages, judgment is hereby rendered in favor of plaintiff against said defendants, Abbey Nursing Home, Inc. and Max Strauss for Two Hundred Fifty Thousand Dollars ($250,000.00) plus interest at the rate of ten percent (10%) per annum from July 22, 1982, and costs of this action.

/S/ George J. McMonagle, Judge
(Sitting by assignment, Cuyahoga County, Ohio)

ACKNOWLEDGMENT OF CONSENT TO REMITTITUR:

/S/ N. M. DeVito
Attorney for Plaintiff

November 3, 1982

Received for Filing, November 8, 1982
Gerald E. Fuerst, Clerk

VOL 623 PG 765

STATE OF OHIO	)	
	)	SS.
COUNTY OF CUYAHOGA	)	
	)	IN THE COURT OF
	)	COMMON PLEAS
	)	
	)	CASE NO. 988159
	)	
THE ESTATE OF	)	
ALMA RICHARDSON,	)	
	)	JOURNAL ENTRY
Plaintiff,	)	
	)	
vs.	)	
	)	
ABBEY NURSING HOME,	)	
INC. AND MAX STRAUSS,	)	
	)	
Defendants.	)	

Upon consideration of the Motion by the Defendants for a New Trial or, in the alternative, for a Motion for Judgment Notwithstanding a Verdict and for a Remittitur, the Court finds that the verdict of the jury and the judgment thereon with respect to punitive damages is excessive by $125,000.00, although not the result of passion and prejudice.

IT IS THEREFORE ORDERED that if the Plaintiff consents to a remittitur in the amount of

$125,000.00 within ten (10) days of the entry of this judgment reducing the amount of the verdict and judgment with respect to punitive damages by said amount, the Motion for a New Trial will be overruled. The Motion for Judgment N.O.V. will likewise be overruled.

The consent of the Plaintiff to the said remittitur shall be in the form of a proposed Journal Entry prepared by counsel for the Plaintiff and submitted to the Court within ten (10) days of October 27, 1982.

/S/ George J. McMonagle, Judge
(Sitting by Assignment)

Dated: October 27, 1982
Received for Filing October 29, 1982
Gerald E. Fuerst, Clerk

VOL 622 PG 619

STATE OF OHIO	)	
	)	SS.
COUNTY OF CUYAHOGA	)	
	)	IN THE COURT OF COMMON PLEAS
	)	
ALMA RICHARDSON,	)	CASE NO. 988159
	)	
Plaintiff,	)	
	)	
v.	)	JOURNAL ENTRY
	)	
ABBEY NURSING HOME,	)	
INC. AND MAX STRAUSS	)	Official Court Reporter in
	)	attendance ten (10) days.
Defendants.	)	Fee of $80.00 ordered taxed
	)	as costs.

George J. McMonagle, J.:
(Sitting by assignment)

The jury in this case having on the 22nd day of July, 1982, rendered a verdict in favor of plaintiff in the sum of $75,000.00 against defendants, ABBEY NURSING HOME, INC. and MAX STRAUSS, as compensatory damages, and having further rendered a verdict in favor of plaintiff and against said defendants in the sum of $300,000.00 as punitive damages, judgment is hereby rendered in favor of plaintiff against said defendants, ABBEY NURSING

EXHIBIT H

HOME, INC. and MAX STRAUSS for $375,000.00 and costs of this action.

/S/ George J. McMonagle, Judge
(Sitting by Assignment, Cuyahoga County, Ohio)

July 22, 1982

Received for Filing July 26, 1982
Gerald E. Fuerst, Clerk

not be dismissed, and a directed verdict will not be granted in his favor?

THE COURT: That is right.

MR. WILLACY: I would urge the Court to reconsider that because there has been no testimony before this Court with regard to the negligence of other employees, defendants Brooks and Litowitz, having been let out of the case.

Whose negligence is Mr. Strauss now supposed to be held responsible for?

THE COURT: I have reconsidered, and I adhere to the ruling that I have made.

MR. WILLACY: Thank you, your Honor.

With regard to Abbey Nursing Home, we move the Court for a directed verdict for the reason that, as is required by the decision of the

Court of Appeals in Youngberg vs. Romeo, that all the plaintiff has produced is evidence that professional decision-makers, nurses, physicians, aides, and orderlies exercised their decision-making prerogative in caring for Alma Richardson, and did so in a manner which the plaintiff did not care for.

However, under the teaching of the Supreme Court of the United States, in the case of Youngberg vs. Romeo, these decisions made by professional decision-makers are presumptively valid. The plaintiff has produced no evidence to oppose the presumptive validity of those decisions. And, therefore, plaintiff has failed to substantiate the burden of proof in that regard.

Moreover, plaintiff has not substantiated or offered any evidence with regard to the standard of care applicable to the nursing home corporation, proprietor of a nursing home, as opposed to the nurses or administrator, who worked therein. Having not put forth a standard with regard to the

proprietor of a nursing home, the nursing home corporation, there can be no proof, and plaintiff has offered no proof of a failure to meet that standard of care, and there has been no proof that a breach of the standard was the proximate cause of any injury to Alma Richardson.

If the Court will simply look at the —

THE COURT: Look it. Look it, Mr. Willacy.

MR. WILLACY: Yes, your Honor.

THE COURT: Without going on, I don't understand, you know — I have given a lot of consideration to this, and I have obviously some precedence set for this particular case with respect to whether the matter, based upon the matter of the prior case, this isn't substantial. That is for sure. But the evidence here presents jury questions with respect to Abbey Nursing Home and also to Max Strauss, and your motion is with respect to them being dismissed, is overruled.

MR. DeVITO: I would only state for the record, your Honor, that it is my understanding that the standard is reasonable care and —

THE COURT: I will change my mind now. What do you want me to do?

MR. DeVITO: No, your Honor. I just wanted to state what the standard is.

MR. WILLACY: Your Honor, in that regard, I would beg the Court to reconsider, and briefly to just take into consideration the Fourteenth Amendment of the United States Constitution, which accords to every individual who is sued the right to due process of law in defending himself against that lawsuit in terms of money damages.

THE COURT: I have given the Fourteenth Amendment due consideration, not only now but previously.

MR. WILLACY: With respect to the Privacy clause of the United States Constitution, your Honor —

THE COURT: All right. The defendant is concerned, and the plaintiff is concerned. They have been afforded or are being afforded and will be afforded all of the Constitutional rights and guarantees.

MR. WILLACY: At the same time —

THE COURT: I have reconsidered. My decision is the same.

What else do we have?

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, City of Columbus,	)	1981 TERM
	)	To wit:
Estate of Alma Richardson, Verneda Bentley, Adm'x.,	)	November 25, 1981
	)	NO 81-1453
Appellee,	)	
	)	MOTION FOR AN ORDER
vs.	)	DIRECTING THE COURT
	)	OF APPEALS for
Abbey Nursing Home, Inc.,	)	Cuyahoga County
	)	
Appellant.	)	TO CERTIFY ITS
	)	RECORD

It is ordered by the Court that this motion is overruled.

COSTS: Motion Fee, $20.00, paid by Willacy & LoPresti.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____, 19___.

Thomas Startzman, Clerk

/S/ Samuel Adkins, Deputy

EXHIBIT J

THE SUPREME COURT OF OHIO

THE STATE OF OHIO City of Columbus,	)	1981 TERM
Estate of Alma Richardson, Verneda Bentley, Adm'x.,	)	To wit: November 25, 1981
Appellee,	)	No. 81-1453
vs.	)	APPEAL FROM THE COURT OF APPEALS for Cuyahoga County
Abbey Nursing Home, Inc.,	)	
Appellant.	)	

This cause, here on appeal as of right from the Court of Appeals for CUYAHOGA County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court **sua sponte** dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for CUYAHOGA County for entry.

EXHIBIT K

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____ 19___.

Thomas Startzman, Clerk

/S/ Samuel Adkins, Deputy

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, City of Columbus,	)	1981 TERM
	)	To wit:
Estate of Alma Richardson, Verneda Bentley, Adm'x., Appellee,	)	November 25, 1981 No. 81-1454
vs.	)	MOTION FOR AN ORDER
	)	DIRECTING THE COURT
Abbey Nursing Home, Inc., et al., Appellants.	)	OF APPEALS for Cuyahoga County
	)	TO CERTIFY ITS
	)	RECORD

It is ordered by the Court that this motion is overruled.

COSTS: Motion fee, $20.00, paid by Willacy & Lopresti.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____ 19 ___.

Thomas Startzman, Clerk

/S/ Samuel Adkins, Deputy

EXHIBIT L

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, City of Columbus,	)	1981 TERM
	)	To wit:
Estate of Alma Richardson, Verneda Bentley, Adm'x., Appellee,	)	November 25, 1981 No. 81-1454
	)	
vs.	)	APPEAL FROM THE COURT OF APPEALS
Abbey Nursing Home, Inc., **et al.**, Appellants.	)	for Cuyahoga County

This cause, here on appeal as of right from the Court of Appeals for CUYAHOGA County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court **sua sponte** dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for CUYAHOGA County for entry.

EXHIBIT M

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 25th day of November, 1981.

Thomas Startzman, Clerk

/S/ Samuel Adkins, Deputy

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

Estate of Alma Richardson, Deceased, Verneda Bentley, Administratrix,	)	COURT OF APPEALS NOS. 42156 & 42168
Appellee,	)	LOWER COURT NO. 988,159 C.P.
vs.	)	MOTION NO. 54110
Abbey Nursing Home, Inc., et al.,	)	
Appellant.	)	

DATE: September 25, 1981

JOURNAL ENTRY

Motion to Certify overruled. Exc.

RECEIVED FOR FILING: September 25, 1981
Gerald E. Fuerst, Clerk

DAY, P. J.,
KRENZLER, J.,
PRYATEL, J., CONCUR

/S/ Jack G. Day
Presiding Judge
JACK GRANT DAY

EXHIBIT N

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NOS. 42156 & 42168

ESTATE OF ALMA RICHARDSON, VERNEDA BENTLEY, ADMINISTRATRIX	)	APPEAL FROM COMMON PLEAS COURT
Plaintiff-Appellant (Case No. 42156) Plaintiff-Appellee (Case No. 42168)	)	NO. 988,159
vs.	)	JOURNAL ENTRY AND OPINION
ABBEY NURSING HOME, INC., et al.,	)	
Defendants-Appellees (Case No. 42156) Defendants-Appellants (Case No. 42168)	)	

Date: July 9, 1981

DAY, J.:

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on

EXHIBIT O

consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

This case consolidates appeals by plaintiff, Estate of Alma Richardson (plaintiff), and defendant, Abbey Nursing Home, Inc. (defendant), from a judgment entered May 5, 1980, after a jury verdict of $3,188 for plaintiff against defendants. Plaintiff appealed in Case No. 42156, defendant appealed in Case No. 42168. Both appeals result from the same lower court trial. Each party assigns errors separately. The disposition of these will clarify their respective

positions.

For the reasons adduced below, the judgment of the trial court is reversed and the case remanded for further proceedings according to law.

Alma Richardson (decedent, Richardson) was admitted to Abbey Nursing Home (Abbey, defendant) from University Hospitals on February 3, 1978. She was sixty-four years old, weighed more than two hundred pounds (Tr. 756) and required total care (Tr. 758-759, 795). Richardson's left side was paralyzed from several strokes; she could not walk nor feed herself and was incontinent. She suffered from chronic hypertension, heart disease and had a soft spot on her head from brain tumor surgery in which part of her skull was removed. She had difficulty speaking (see, e.g., Tr. 7,

755-758, 795, 1520, G. 9, 49).[1] Her reference to Abbey came because her family could no longer care for her at home (Tr. 789, 795, 827). When admitted to Abbey, Richardson had no rashes, bruises, abrasions or lacerations and her skin was clear (Tr. 13, 859, St. 37-38).

Richardson's family removed her from the nursing home on June 19, 1978, and took her by ambulance to the University Hospital emergency room. She was dirty and had an odor (Tr. 10, 870). The attending physician, Dr. Bruce Goodfellow, asked her family to wash her (G.

---

[1]Eight volumes of transcript are included in the record of these appeals. One volume is a partial transcript for Case No. 42168 and references to that volume will be prefaced "D". Six volumes of transcript for Case No. 42156 are paginated consecutively and are indicated "Tr". Volumes containing the testimony of Dr. Goodfellow and Max Strauss each begins with 1. References to these volumes will be prefaced "G" and "St", respectively.

9, Tr. 870, 871, 995) before he examined her. On examination, he found her in pain (Tr. 872, G. 17, 20, 26) and noted a large bruise on her upper left arm (G. 11), two abrasions on her posterior thigh (G. 13, 17) and a rash "similar to a diaper rash" (G. 17) under her breasts (G. 17, 44, 80). He concluded that Richardson's injuries were caused by an outside force (G. 28) and testified that her condition was consistent with mistreatment (G. 19, 48).

On the day Richardson was brought to the emergency room from Abbey, Dr. Goodfellow and Walter Drummond, University Hospitals' social work supervisor, prepared a report on Richardson for the Cuyahoga County Welfare Department (Exh. 23, G. 14-15, Tr. 82). At trial Drummond testified that he "saw multiple bruises . . . that concerned me" (Tr. 76, 80). Bruises were

observed on her upper arms and buttocks (Tr. 80, 350).

From University Hospitals Mrs. Richardson was discharged to the home of her granddaughter, Verneda Bentley (plantiff) where Bentley and her four children provided round-the-clock care until Richardson died (Tr. 876-877) on April 1, 1979 (Tr. 881).

Richardson filed suit in August, 1978, against the nursing home corporation, its administrator-owner Max Strauss (St. 4, 284), Nursing Director Pat Litowitz, one "Mrs. Brookins" (nurse's aide), Evelyn Brooks and others later dismissed from the suit. Richardson's complaint was based on negligence and assault. She died before trial and Bentley, executrix* of Richardson's estate, pursued the claim.

---

* The literature generated by the case sometimes refers to Bentley as "administratrix".

Plaintiff presented several witnesses who testified to conditions at Abbey while decedent was confined there as well as to complaints decedent had. These witnesses included Sharon Cummins, a former Abbey employee in the social service department (Tr. 5), Meg Algren (Margaret Algren Marino), a newspaper reporter who accompanied the Ohio Nursing Home Commission on a surprise inspection of Abbey in May, 1978 (Tr. 97-98), Sister Catherine Cassidy of the pastoral ministry of St. Agnes Parish who had visited Abbey two or three times per month for three-and-a-half years (Tr. 1805-1806), as well as the plaintiff (executrix) herself who said she visited her grandmother at Abbey six out of seven days per week (Tr. 759).

Plaintiff's witnesses testified that the nursing home smelled of human waste

(See e.g., D. 64, Tr. 454, 763, 764, 1824-1825, 1828, 1850). Sister Cassidy saw what appeared to be feces and urine on the walls (Tr. 1827-1828). Bed linens were smelly or dirty (Tr. 829, 1826); bed pans and commodes were not cleaned or emptied (Tr. 838, 1824, 1828); patients were seen tied to chairs, some with pieces of torn sheets (Tr. 100, 391, 1830); some with little or no clothing (Tr. 117, 1824); some sitting in their own waste (Tr. 1829).

Some of plaintiff's witnesses noted dirty dinnerware (Tr. 18, 830); dirty water pitchers (Tr. 37); flies in the dining room; flies on the food and food on the floor (Tr. 101). Roaches were seen (Tr. 18, 763) -- in fact one patient was reported to have eaten cockroaches (Tr. 64) -- and even Strauss admitted the home had cockroaches (St. 52, 79, 198,

289). Algren said:

> "Patients were tied in chairs and they smelled. There were holes in the ceiling, holes in the walls, stains on the walls that smelled like urine.
>
> "Tile was up off the floor. The rooms were filthy and dingy.
>
> "Toilets, none of the rooms I saw had working toilet facilities, but they did have abandoned toilets in the rooms and bathtubs and some of them had wires hanging down, electrical wires hanging around. Others had no electrical wires and no lights.
>
> "The place smelled to the point that you had a difficult time continuing on the tour." (Tr. 100-101)

Witnesses observed physical and verbal abuse of patients (Tr. 118-119, 819, 820) and unattended sick people (Tr. 763).

Plaintiff's witnesses, primarily plaintiff and Cummins, testified that they had observed specific problems

concerning the decedent. Both said they found her sitting in her own waste (Tr. 8, 789, 811), found her sitting in a wheelchair or a potty chair all day (Tr. 11, 12, 765), and that she acquired rashes and bruises while at Abbey (Tr. 11, 44-46, 822-823, 849). Former employee Cummins said she saw two patients, a man and a woman, each attempt sexual attacks on the paralyzed decedent (Tr. 31-33). Plaintiff observed her grandmother's eye red and swollen the day after Mother's Day, 1978 (Tr. 780-781), and testified that Richardson had told her that Evelyn Brooks hit her with a towel (Tr. 783, 842, 955). Cummins said Richardson's face was black and swollen around her eye (Tr. 13), as if someone had hit her (Tr. 270).

Brooks admitted working Richardson's floor on Mother's Day (Tr. 681). She said she never hit a patient (Tr. 664,

669) and did not hit Richardson on May 15 or ever (Tr. 1543).

Defendants Strauss and Litowitz, in examining Richardson's file, admitted she had fallen from a potty chair at least once (Tr. 1659, St. 89) suffering bruises and lacerations from the fall (Tr. 1659-1660, St. 91). Another employee also testified to a fall (Tr. 1620).

Plaintiff called Alan Blake Chadwell, program operations coordinator for the Nursing Home Program of the Ohio Department of Health (Tr. 457) to testify concerning state nursing home regulations and also to say that at the time of trial Abbey's license had been revoked (Tr. 462-463), but the trial court limited his testimony (Tr. 465). Plaintiff proferred that Chadwell's evidence would address general conditions at Abbey (Tr. 473).

The three individual defendants were called by both sides. Litowitz, who was fired from Abbey in 1978 (Tr. 650, St. 128) for personal differences with Strauss (Tr. 651, St. 144), recalled a bruise on Richardson's arm, two small abrasions, a rash between her legs (Tr. 615-616), and lacerations on her leg the day she left Abbey (Tr. 641). Strauss also saw the bruise on her left arm, and chafing (St. 59, 60, 239).

Strauss and Litowitz both testified that Abbey provided adequate care for its patients and was adequately staffed, although Strauss admitted not having the required number of registered nurses on the night shift at all times (St. 31) and Litowitz said only four licensed practical nurses (LPNs) were covering seven floors on June 19, 1978 (Tr. 580, 589).

Charlotte Poole, an LPN who was assistant nursing supervisor at Abbey in June, 1978 (Tr. 1565-1566), testified that Richardson told her that her (Richardson's) left arm was bruised because she had a tendency to lean against it in her wheelchair (Tr. 1572).

Plaintiff Bentley detailed how she and her children cared for the decedent (Tr. 876, 878-879). She estimated expenses of $4,700 to $5,000 in caring for her grandmother (Tr. 952). Bentley obtained such items as a Hoyer[2] lift, commode, medical table, air mattress, sheepskin, special linens (Tr. 880, 950, 951), clothing, gowns and support hose (Tr. 948, 950, 951), diapers (Chux pads) (Tr. 951-952), and such medical supplies as ointments, gauze, disinfectants (Tr. 949).

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[2] "Hoyle" in the Tr. 880.

Also purchased were a blender (Tr. 881), liquid nutritional food (Tr. 892), coloring books, crayons and balls (Tr. 950), and Bentley had Richardson's room painted and a tile floor installed (Tr. 880).

The trial court refused to admit into evidence (Tr. 941) cancelled checks, bills, receipts, and other exhibits pertaining to expenses for Richardson's care from the time she left Abbey until she died (Tr. 899-942).

After a lengthy trial in February, 1980, A Common Pleas Court jury returned a verdict of $3,188 against Abbey, the corporate defendant, but not against any of the individuals. The trial court directed out plaintiff's claim for assault, cruel treatment, and punitive damages (Tr. 1495-1496).

In response to interrogatories prepared by the plaintiff, the jury of eight unanimously found that Alma Richardson was cared for negligently at the nursing home and seven of the eight found that such negligence proximately caused her injuries.

Defendant also propounded several interrogatories to the jury -- to which plaintiff objected (Tr. 1878) -- asking whether Strauss, Litowitz, Brooks, or any other Abbey employee "whipped or beat" Alma Richardson and whether Brooks negligently struck her in the eye "within the scope of her employment". The jury returned negative responses to these interrogatories. In response to additional interrogatories by the defendant, the jury did not find individual negligence by Strauss, Litowitz, Brooks, or any other employee

causing Richardson to sustain physical injury.

From the verdict defendant appealed, assigning three errors:

Assignment of Error I:

> "The trial court committed error prejudicial to the defendant, Abbey Nursing Home, Inc., in refusing to direct a verdict against plaintiff at the close of plaintiff's case wherein plaintiff had adduced no evidence from an expert in the nursing home industry or nursing profession --
>
> "A. regarding the standard of care generally accepted in such industry or profession,
>
> and
>
> "B. that plaintiff's decedent's claimed injuries proximately resulted from one or more breaches of such standard(s) of care."

Assignment of Error No. II:

> "The trial court committed error prejudicial to the defendant, Abbey Nursing Home, Inc., in refusing to direct a verdict against plaintiff at the close of plaintiff's case

wherein plaintiff had adduced no evidence from a medical expert that, as a matter of 'reasonable medical certainty' or 'probability', plaintiff's decedent's claimed injuries were proximately caused by the neglect alleged by plaintiff."

Assignment of Error No. III:

"The trial court committed error prejudicial to the defendant, Abbey Nursing Home, Inc., in overruling said defendant's motion for judgment notwithstanding the verdict where the jurors' answers to interrogatories submitted to them established that no person employed by said defendant corporation had negligently caused injury to plaintiff."

Plaintiff also appealed, assigning six errors:

Assignment of Error No. I:[3]

"The Trial Court committed prejudicial error to plaintiff by refusing to instruct the jury on the issue of punitive damages because plaintiff introduced evidence showing gross negligence on the part of

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[3] Roman numerals are substituted for the plaintiff's use of the alphabet in designating her assignments of error.

defendant and that defendant's conduct showed a complete and reckless indifference to the rights and safety of plaintiff."

Assignment of Error No. II:

"The Trial Court committed prejudicial error to plaintiff by refusing to admit certain official records of the State of Ohio and certain other evidence."

Assignment of Error No. III:

"The Trial Court committed prejudicial error to plaintiff by directing a verdict against plaintiff on issue of battery where there was direct testimony of a battery committed on plaintiff's decedent and such issue was in dispute."

Assignment of Error No. IV:

"The Trial Court committed prejudicial error to plaintiff by not instructing the jury that compensatory damages included compensation for medical expenses incurred in treating injuries which were the proximate cause [sic] of the negligence of defendant."

Assignment of Error No. V:

"The Trial Court committed prejudicial error to plaintiff

by submitting improper and prejudicial interrogatories to the jury because the interrogatories were confusing and worded in an amotional [sic] manner on an issue upon which a directed verdict had previously been granted."

Assignment of Error No. VI:

"The Trial Court committed prejudicial error to the plaintiff by answering questions of the jury after the jury had commenced deliberations without notice or presence of counsel for either party and without such questions and answers being a matter of record."

II.

The issue under the defendant's first assignment of error is whether expert testimony is needed to establish the standards in the nursing home industry or nursing profession. While no Ohio cases dealing with standards of care for nursing homes have been found, Ohio has said expert opinion is not necessary to establish the standard of care for hospitals in the community when the case

turns on the negligence of a nurse who allowed a patient to fall out of bed, Jones v. Hawkes Hospital of Mt. Carmel (1964), 175 Ohio St. 503, 504, 506. Cases outside of this jurisdiction have indicated the generally accepted standard of care for such institutions is reasonable care. In Alabama the standard has been said to be "care which persons of common prudence exercise under like conditions", Dunahoo v. Brooks (Ala. 1961), 128 So. 2d 485, 488. A Louisiana court took a similar approach:

> "Although a nursing home is not the insurer of the safety of its patients, nevertheless it is the duty of the nursing home to provide a reasonable standard of care taking into consideration the patient's mental and physical condition." Powell v. Parkview Estate Nursing Home (La. App. 1970), 240 So. 2d 53, 57.

And in Illinois, an appeals court found liability for "actionable negligence" on behalf of a nursing home patient who had been struck by a drunken fellow patient because nursing homes:

> "[O]we their patients ordinary care to protect them from any danger or injury which might be reasonably anticipated. As to dangers reasonably to be anticipated from acts of other persons under the hospitals' control, reasonable care and attention must be exercised for the safety and well-being of their patients, in proportion to the circumstances and their ability to look after their own safety." Bezark v. Kostner Manor (1961), 29 Ill. App. 2d 106, 111, 172 N.E. 2d 424, 426.

Even if experts had testified to the usual and customary care given by a nursing home, "it is entirely possible . . . that what is usual and customary [in the nursing home industry] may itself be negligence", Stogsdill v. Manor Convalescent Home (1976), 35 Ill. App. 3d

634, 662, 343 N.E. 2d 589, 610.

The logic in support of a "reasonable care" standard is persuasive for a service facility which is essentially custodial. Decedent's medical care while at the defendant institution is not a major issue in this case. Her care, as a human being needing protection, is.

Resolution of that issue is to be determined by the standard of reasonable care, not the more sophisticated standard governing medical malpractice. Moreover, facts in the present case demonstrate that the faults ascribed to the defendant nursing home do not fit medical malpractice taxonomy.

Defendant's first assignment of error lacks merit.

III.

Defendant's second assignment of error, like its first, concerns the necessity for expert testimony. Defendant argues that because plaintiff presented no testimony that as a "reasonable medical certainty" decendent's injuries were proximately caused by defendant's negligence, it was error for the trial court to direct a verdict for the plaintiff.

A.

Jurors:

> "are supposed to be competent, and peculiarly qualified to determine the connection between the cause and effect established by common experience, and to draw the proper conclusions from the facts before them; and if the matter can be decided from ordinary experience and knowledge, the jury are allowed to decide it unaided . . . ." Jones v. Hawkes Hospital of Mt. Carmel, supra at 506-507.

Thus, it was within the competence of the jury to determine proximate cause in this case unless the connection was so esoteric as to be beyond the ken of laymen without expert assistance.

Here, there were questions of "cause and effect . . . so apparent as to be matters of common knowledge", Darnell v. Eastman (1970), 23 Ohio St. 2d 13, 17. For expertise in science is not required to connect bodily discomfort and ill being with sitting or lying in excrement and living in generally squalid conditions. For the same reason, expertise is not required to connect battering and bruises. More exotic physical and psychological effects would require an expert to establish cause and effect. These do not.

B.

For a directed verdict the evidence must be construed "most strongly in favor

of the party against whom the motion is directed". If reasonable minds could then differ on the result, the motion must be denied, Civ. R. 50(A)(4).[4] The rule involves a question of law. See also Hawkins v. Ivy (1977), 50 Ohio St. 2d 114, 115:

> "[I]f there is substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions, the motion must be denied."

[4] Rule 50(A) Motion for a directed verdict.

"(4) When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

After a three-and-a-half week trial the court reasonably found sufficient evidence to deny the motion for a directed verdict on negligence.

Defendant's second assignment of error is not well taken.

IV.

Defendant's third and plaintiff's fifth assignments of error concern interrogatories propounded to the jury under Civ. R. 49(B) and will be considered together. Defendant argues that the jury's answers to the numerous interrogatories were inconsistent with the general verdict of negligence against the corporate defendant. Plaintiff contends that the trial court erred in submitting confusing and improper interrogatories.

A.

Interrogatories A and B, propounded by the plaintiff, were accepted by defendants (Tr. 1910). In response to these queries the jury found that decedent "was negligently cared for by Abbey Nursing Home" and that such negligence was the proximate cause of her injuries. These responses are consistent with the general verdict.

Interrogatories Nos. 1 and 2, propounded by defendant, seem to have been accepted by plaintiff in conference with the court and defendants' counsel (Tr. 1884-1887), but the acceptance is not entirely clear. In any event, plaintiff later objected to all of defendants' interrogatories (Tr. 1918-1920, 1959) thus preserving the objection, App. R. 12(A). An examination of Nos. 1 and 2 is considered infra at fn. 6 and C.

B.

Interrogatories should be directed toward determinative issues, Ragone v. Vitali & Beltrami, Jr. (1975), 42 Ohio St. 2d 161, 171. "If the interrogatories are not based on the evidence . . . the judge need not submit them to the jury." Id. at 165-166. Determinative issues are defined as "ultimate issues which . . . will definitely settle the entire controversy . . .", Richley v. Liechty (1975), 44 Ohio App. 2d 359, 362. "In a negligence action . . . the determinative issues include the issues of negligence, proximate cause, contributory negligence and damages." Id. at 363.

Interrogatories Nos. 3 through 15 do not go to any ultimate issue. For they do not address matters based on evidence.

Interrogatory No. 3 asks whether Max Strauss "beat" decedent. No. 6 asks

whether Pat Litowitz "whipped or beat" decedent. No. 9 makes the identical inquiry for Evelyn Brooks and No. 12 asks the same about "any employee of the Abbey Nursing Home, Inc., other than the individual defendants". The remainder of the questions interrelate with 3, 6, 9, and 12. Nos. 4, 7, 10 and 13 ask for specific "date(s) . . . that such whipping(s) or beating(s) occurred". Nos. 5, 8, 11, and 15 ask whether such "whipping(s) or beating(s)" were the proximate cause of decedent's injuries. In addition, No. 14 asks for the names of the employees who "beat or whipped" decedent.

The lengthy transcript supports the in camera contention of plaintiff's counsel before closing arguments that he never claimed that Max Strauss beat decedent (Tr. 1887, 1893, 1895, 1899,

1900). Nor did plaintiff claim Litowitz or Brooks administered whipping(s) or beating(s) (Tr. 1899, 1900).[5] Strauss was named in the complaint, counsel said, because:

> "He had the responsibility as the administrator of the nursing home to see to it that she gets proper care and treatment and that she does not get injured.
>
> "He had that responsibility but we are not claiming that Max Strauss beat the plaintiff's decedent." (Tr. 1894)

As for specifics concerning beating(s) administered by unnamed employees, counsel for plaintiff claimed that decedent "was beaten . . . but we don't know who did it" (Tr. 1884, 1900).

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[5] Plaintiff did argue during trial and presented testimony, that Brooks struck decedent in the face with a towel around Mother's Day, but other than that specific contention no claim of beating or whipping by Brooks was argued.

Interrogatories 3 through 15 were erroneously submitted because the inquiries contained in them were not relevant to contentions made by the plaintiff's pleading and proof. Baker v. Ohio Ferro-Alloys Corp. (1970), 23 Ohio App. 2d 25, 33.

In addition, all the questions in 3-15 were misleading because they were not grounded upon plaintiff's claims, Baker v. Ohio Ferro-Alloys Corp., id. Moreover, all the first fifteen interrogatories lent themselves to an erroneous assumption of law, see McFadden v. Thomas (1951), 154 Ohio St. 405, 411. For, to paraphrase McFadden, from a reading of interrogatories 1 through 15 the jury "could well believe" that unless

Brooks negligently struck the plaintiff[6] or that Brooks, Strauss, Litowitz or some other Abbey employee administered beatings to the decedent none of the individuals could be rendered liable.[7] And, because this is a principal and agent case it may have influenced the lay judgment of the jurors so that they concluded that the corporate responsibility, if found, displaced all individual liability and made it irrelevant. These circumstances nullified the plaintiff's right to have the jury consider the role of the individual defendants in negligently failing to

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[6] Interrogatory No. 1 combined three issues -- negligent striking, the date and the scope of employment -- thus contributing to ambiguity by posing three related but not necessarily interdependent questions.

[7] A claim cause of action for assault was dismissed by the trial court (Tr. 1495-1496). Therefore, assault issues were not before the jury.

act to care for the plaintiff and secure her from injury inflicted either by subordinate employees, other residents or outsiders. It follows that interrogatories framed on theories of personal involvement of the corporate agents in direct action rather than negligent omissions were misleading and irrelevant.[8] Whether by design or inadvertence such questions could contribute nothing to the function of the trial except to assist the jury in losing its way.

C.

"Where an interrogatory is ambiguous and susceptible to . . . different

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[8] The posture of the liability issues in this case make it unnecessary to explore analogies to alternative liability theories. See Ferrigno v. Eli Lilley and Co. (1980), 175 N.J. Super. 551, 420 A. 2d 1305; and cf. Sindell v. Abbott Laboratories (1980), 163 Cal. Reptr. 132, 26 Cal. 3d 588, 607 P. 2d 924. See also Ybarra v. Spangard (1944), 25 C. 2d 486, 154 P. 2d 687.

meanings it must be construed against the party drawing it", Klever v. Reid Brothers Express, Inc. (1949), 151 Ohio St. 467, 474.

In respose to interrogatory No. 1 the jury found that Evelyn Brooks did not negligently strike decedent in the eye on or about May 15, 1978, while acting within the scope of her employment. This interrogatory is ambiguous in that the jury's response may not mean that it did not believe that Brooks struck decedent but it could have felt that such action was not "within the scope of her employment" or that it occurred on a different date. Having answered No. 1 negatively, No. 2 became moot.

Interrogatory No. 16 asked whether Strauss "negligently caused Alma Richardson to sustain physical injury as

is alleged by the plaintiff". Nos. 17, 18, and 19 were identical for Litowitz, Brooks, and Abbey Nursing Home,[9] respectively. The interrogatories involved compound questions, conclusions of law, carried latent ambiguities,[10] and/or were not grounded on the evidence. For the answers could mean no negligence, no causation, or no injury "as it alleged by plaintiff". Thus, a negative answer is meaningless. Interrogatories flawed as these were could contribute to the jury's confusion and should not have been submitted at all.

D.

The answers to interrogatories Nos. 20 and 21 do not contradict the general

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9 No. 19 asked about Abbey's vicarious liability through "one or more of [Abbey's] employee [sic]" not joined in the lawsuit.

10 Freedman v. New York, N. H. and H. R. Co. (1908), 81 Conn. 601, 614, 71 A. 901, 906.

verdict. The answers negate particular injuries but far less than all of the hurt supported in the evidence. From this, it is clear that the answers do not supplant the total claim. After subtracting the particulars, enough remains to support the general verdict. This subtraction comports with the duty to harmonize noted in Klever v. Reid Brothers Express, Inc., supra at 474.

In addition, these two interrogatories were fatally marred because the questions were hypothetical, called for facts of an evidentiary nature and for conclusions of law.[11]

Defendant's third assignment of error is without merit.

Plaintiff's fifth assignment of error is well taken insofar as that

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[11] See fn. 9, supra; Ragone v. Vitali & Beltrami, supra, 171.

assignment contends that the trial court committed prejudicial error in submitting the defendants' interrogatories to the jury.

V.

Plaintiff's sixth assignment of error attacks the trial court's administration of justice in answering questions from the jury concerning the interrogatories without counsel present or notified. Plaintiff submits an affidavit from counsel and an affidavit from a juror in the case accompanied by copies of the written questions and the court's written responses.

However, the disposition of defendant's third assignment of error renders plaintiff's sixth assignment of error moot. Accordingly, the plaintiff's sixth assignment of error is without merit because moot.

IV.

In her third assignment of error plaintiff contends that the trial court should have permitted the jury to consider the battery issue[12] which it directed out (Tr. 1494-1495). In the first and fourth assignments plaintiff's attack centers on the failure of the court (1) to instruct on punitive damages (First Assignment), and (2) to instruct that compensatory damages included medical expense incurred in treating injuries proximately causes by the "negligence of the defendant" (Fourth Assignment).

The trial court ruled out punitive damages at the end of plaintiff's case when it also dismissed her third cause of

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[12] Plaintiff's third assignment of error is phrased in terms of battery but the third cause of action in her complaint claims "assault and cruel treatment".

action (Tr. 1494-1495). In its charge to the jury the court discussed neither punitive damages nor medical expense as part of the compensatory damages. The only damage charge was:

> "If you find for the Plaintiff, you will determine from the preponderance of the evidence the amount of money reasonably to compensate the Plaintiff decedent for the actual injury proximately caused by the negligence of the Defendant.
>
> "In determining this amount, you will consider the nature and extent of the injury, its effect upon physical health, the pain and suffering that was experienced.
>
> "If you should find that the Plaintiff's decedent is entitled to a verdict, you may award her a sum which will compensate her reasonably for pain, any pain, suffering and mental anguish already suffered by her and proximately resulting from the injury in question." (Tr. 1942-1943)

The plaintiff objected extensively to the charge, including the failure to

instruct on medical expense (Tr. 1957), punitive damages (Tr. 1957) and specific, enumerated acts of negligence (Tr. 1958).

A.

Although, as defendant argues, "actual malice is ordinarily required in order to sustain an award of punitive damages" in tort cases, Columbus Finance Co. v. Howard (1975), 42 Ohio St. 2d 178, 183, the Ohio Supreme Court also indicated that actual malice may be inferred from "intentional, reckless, wanton, wilful and gross acts which cause injury to person or property", id. at 184. And a plaintiff may recover punitive damages for negligence "where that negligence is so gross as to show a reckless indifference to the rights and safety of other persons", Gearhart v. Angeloff (1969), 17 Ohio App. 2d 143, 146.

Sufficient evidence was presented, if believed, to demonstrate "wanton, wilful and gross acts" necessary to support a reasonable person in a conclusion of reckless indifference on the part of Abbey through its representatives. Thus, punitive damages was a jury question and it was error for the trial court to refuse such an instruction.

B.

Plaintiff presented testimony that, if believed, was consistent with assault or battery or "cruel mistreatment" of decedent while she was a patient at the nursing home (see, e.g., Tr. 31-33, 80, 270, 271, 779-783, 841-842, 955, 1069). The defendant Abbey could be charged with allowing all these conditions and occurrences if not inflicting them. Such

conduct or lack of it would be for the jury's consideration in determining whether the defendants exercised reasonable care in supervising the custody of the plaintiff.

As noted earlier,[13] before a motion for a directed verdict can be granted, evidence must be construed most strongly in favor of the party against whom the motion is aimed. If reasonable minds can differ the motion should be denied, Civ. R. 50(A)(4). For a directed verdict properly to be granted the court must determine that as a matter of law "plaintiff's evidence treated as uncontradicted does not entitle him to judgment", Bauer v. Cleveland Ry. Co. (1943), 141 Ohio St. 197, 203.

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[13] Supra, III, B.

C.

As for compensatory damages, plaintiff testified to various expenses incurred in caring for decedent (see, e.g., Tr. 880-881, 948-952), which totaled $4,700 to $5,000 (Tr. 952). In addition, plaintiff attempted to introduce documents purporting to be cancelled checks, bills, and payment records[14] related to decedent's care.

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[14] Exh. 70A-E: cancelled checks to Seeley Oxygen, identified at Tr. 899-901.
Exh. 71: Medicare claims concerning Seeley Oxygen, identified at Tr. 935-936.
Exh. 72: Invoices from Seeley Oxygen, identified at Tr. 938.
Exh. 73: Identified as medical expenses at Tr. 939.
Exh. 74: Bills from University Hospitals, Tr. 938-939.
Exh. 75: Identified at Tr. 939 as charges made by Abbey Nursing Home.

Defendant objected to the introduction of the documents under R.C. §2317.421[15] (cf. Tr. 931). The trial court, citing the statute without explication, refused admission of the exhibits (Tr. 941-942).

Whether or not the documents were admissible under the statute, the

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15 "R.C. §2317.421 Admissibility of medical bills as prima-facie evidence

"In an action for damages arising from personal injury or wrongful death, a written bill or statement, or any relevant portion thereof, itemized by date, type of service rendered, and charge, shall, if otherwise admissible, be prima-facie evidence of the reasonableness of any charges and fees stated therein for medication and prosthetic devices furnished, or medical, dental, hospital, and funeral services rendered by the person, firm, or corporation issuing such bill or statement, provided, that such bill or statement shall be prima-facie evidence of reasonableness only if the party offering it delivers a copy of it, or the relevant portion thereof, to the attorney of record for each adverse party not less than five days before trial."

plaintiff's evidence exemplified a variety of expenses classifiable as medical (although not for professional services) in addition to those demonstrated by the exhibits (p.e., Tr. 949-952). Extensive testimony by the executrix on medically-related expense was not challenged by the defense except when the testimony was elicited by leading questions (see Tr. 949-952). And, in any event she was competent to express her opinion on the extent of such costs, Hall v. Burkert (1962), 117 Ohio App. 527, 529.

The plaintiff was entitled to a jury charge on medical expense tailored to the plaintiff's evidence.

Plaintiff's first, third, and fourth assignments of error are well taken.

VII.

Plaintiff argues in her second assignment of error that it was prejudicial for the trial court to refuse to admit documents pertaining to the state investigation into licensure and certification of Abbey Nursing Home and to refuse to admit the Cleveland Press newspaper articles written by Meg Algren.

Alan Chadwell, program operations coordinator for the nursing home program of the Ohio Department of Health (Tr. 456-457) was permitted to testify that Abbey's license had been revoked by the director of health (Tr. 463, 465), but plaintiff's exhibits 2-14, letters and documents concerning the decertification,

were not admitted.[16] Plaintiff proffered the exhibits to demonstrate what counsel described as "general conditions at Abbey Nursing Home at the time Alma Richardson was a patient" (Tr. 473, 1258-1260). The court sustained objections to the

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[16] The trial court also refused to admit plaintiff's Exh. 1 (Tr. 462), rules and regulations governing licensure of nursing homes in Ohio (Tr. 458), apparently because of Civ. R. 44.1(A)(2):

> "A party who intends to rely on a municipal ordinance, a local rule of court, or an administrative regulation within this state shall give notice in his pleading or other reasonable written notice. The court in taking judicial notice of a municipal ordinance, a local rule of court, or an administrative regulation within this state may inform itself in such manner as it deems proper, and may call upon counsel to aid in obtaining such information. The court's determination shall be treated as a ruling on a question of law and shall be made by the court and not the jury. A court may, however, take judicial notice of its own rules or of a municipal ordinance within the territorial jurisdiction of the court without advance notice in the pleading of a party or other written notice."

evidence because the actions were on appeal (Tr. 465, cf. 468).

The documents in question were not official publications nor attested by the officer having legal custody. Moreover, when witness Chadwell was on the stand, questions were not asked nor a proffer made which would establish him as legal custodian of the records (Tr. 456-474).[17] Had this been done in connection with the proffer and explanation of the documents plaintiff might have perfected her proffer. Since this was not done, it follows that whether the trial judge was correct or not in determining that the appeal status of the licensure and decertification made the proferred material inadmissible, the result was correct -- but for other reasons.

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[17] See Civ. R. 44(A)(1).

The author of the newspaper articles was on the stand. Algren testified at length on direct and cross-examination as to what she saw at Abbey in May, 1978. Apart from their hearsay quality, the articles were merely cumulative evidence. Therefore, no prejudice accrued to plaintiff by the trial court's refusal to admit them.

Plaintiff's second assignment of error is without merit.

VIII.

Reversed and remanded for further proceedings according to law.

JOURNALIZED JULY 30, 1981

GERALD E. FUERST, Clerk of Courts

By J. B. Deputy

This cause is reversed and remanded to the Common Pleas Court for further proceedings according to law.

It is, therefore, considered that said appellant(s) recover of said appellee(s) its costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

KRENZLER, C. J.

PRYATEL, J., CONCUR

Jack G. Day /s/
JUDGE
JACK G. DAY

Case No. 42156:
For plaintiff-appellant: Nicholas M. DeVito, Esq.
For defendants-appellees: Aubrey Willacy & Louis Orkin, Esqs.

Case No. 42168:
For plaintiff-appellee: Nicholas M. DeVito & Louis H. Orkin, Esqs.
For defendants-appellants: Aubrey W. Willacy, Esq.

RECEIVED FOR FILING -- July 9, 1981
Gerald E. Fuerst, Clerk

COPIES MAILED TO COUNSEL FOR ALL PARTIES -- COSTS TAXED.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (See Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

STATE OF OHIO)
) SS.
COUNTY OF CUYAHOGA)

IN THE COURT OF COMMON PLEAS

CASE NO. 988,159

JANUARY TERM,
A.D., 1980

ESTATE OF ALMA RICHARDSON,)
)
Plaintiff,)
)
vs.) JOURNAL ENTRY
)
ABBEY NURSING HOME, et al.,)
)
Defendants.)

Official Court Reporter in attendance 16 days — Fee of $128.00 ordered taxed as costs.

The Jury in this action having on the 27th day of February, 1980 rendered a verdict in favor of plaintiff in the sum of Three Thousand One Hundred Eighty-Eight Dollars ($3,188.00) against defendant Abbey Nursing Home, Inc., Judgment is hereby rendered in favor of plaintiff against defendant Abbey

EXHIBIT P

Nursing Home, Inc. for $3,188.00 and costs of this action.

Further, the Jury having rendered a verdict in favor of defendants Evelyn Brooks, Pat Litowitz and Max Strauss and against plaintiff Estate of Alma Richardson, Judgment is hereby rendered in favor of defendants Evelyn Brooks, Pat Litowitz and Max Strauss and against plaintiff Estate of Alma Richardson.

/S/ JOHN L. MAXWELL, JUDGE
(Sitting by Assignment
from Cuyahoga County)

Dated: February 27, 1980

Received for filing: February 29, 1980

Volume 484-FG-923

CONSTITUTION OF THE UNITED STATES

ARTICLE VI

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

EXHIBIT Q

THE CONSTITUTION
OF THE UNITED STATES

AMENDMENT 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT R

UNITED STATES CODE ANNOTATED
TITLE 42 §§1396, 1396a(a)(25)

§1396. Appropriations

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health and Human Services, State plans for medical assistance.

§1396a. State plans for medical assistance

(a) Contents

A State plan for medical assistance must —

(25) provide (A) that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties to pay for care and services (available under the plan) arising out of injury, disease, or disability, (B) that where the State or local agency knows that a third party has such a legal

liability such agency will treat such legal liability as a resource of the individual on whose behalf the care and services are made available for purposes of paragraph (17)(B), and (C) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability;

BNA FILE COPY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Date Filed: 4-28-83

Date Received: 5-4

DENNY JENKINS,	:	
Plaintiff,	:	
v.	:	Civil Action
UNITED STATES OF AMERICA,	:	No. 82-1082
Defendant.	:	

MEMORANDUM OPINION OF
UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

This case is before the Court on a motion by defendant for summary judgment, which was previously denied without prejudice, and a motion for dismissal under Fed. R. Civ. P. 41(b), plaintiff having completed the presentation of his case at trial. After careful consideration, the Court has decided to grant defendant's motion under Rule 41 (b). Because the Court has decided to grant that motion, it need not reach defendant's other motion,

EXHIBIT T

for summary judgment. The findings of fact and conclusions of law supporting the Court's decision are set forth herein.

I. PLAINTIFF HAS NOT ESTABLISHED DEFENDANT'S NEGLIGENCE FOR HIS FALL IN THE ADMITTING AREA.

Plaintiff has alleged several incidents of negligence by defendant and injury corresponding to each of those incidents. Plaintiff alleges first that he sustained an injury to his chin that required stitches as a result of negligence by defendant that occurred while he was awaiting admission to St. Elizabeth's Hospital on June 15, 1980. On that day, plaintiff, who was in a psychotic state, was brought to the Hospital by the Metropolitan Police, and, upon arrival, was handcuffed to a light weight chair. After a long wait in the admitting area, plaintiff became agitated and attempted to stand up in the chair, as a result of which he fell and hit his chin. Plaintiff alleges that he incurred this injury because defendant was negligent

in its supervision of him and in its choice of a restraint mechanism, namely hand restraints.

As defendant contends, however, in order for plaintiff to establish negligence with respect to this incident, he must demonstrate the applicable standard of care by expert testimony. **See, Haven v. Randolph,** 494 F. 2d 1069 (D.C. Cir. 1974). Defendant notes that the only expert testimony in the record on either supervision or restraint is that of Dr. John Syphax, who testified that the manner in which plaintiff was restrained in the central admitting area did **not** fall below the applicable standard of care. Plaintiff counters that although no expert has articulated a contrary view, the proper standard of care can be deduced from t[illegible] conduct of Howard University, where plaintiff was handled on the very day he was taken to St. Elizabeth's. Plaintiff, however, has cited no authority to support its view that a standard of care can be established by an alternative approach to treatment at a different hospital. Moreover, as defendant

points out, while plaintiff was at the other hospital, he was at one point rolled in a wheelchair with only his hands tied, treatment not at all unlike that which he received in the admitting area of St. Elizabeth's. Accordingly, the Court finds that plaintiff has not shown by a preponderance of the evidence that defendant was negligent with respect to the fall in central admitting.

II. PLAINTIFF HAS NOT ESTABLISHED DEFENDANT'S NEGLIGENCE FOR HIS FALL IN THE WARD.

Plaintiff alleges next that he sustained injury to his face and hands when, on June 16, 1983, he fell on his head in the St. Elizabeth's ward to which he was assigned. This fall, he claims, was due to the negligence of defendant in supervising him and in administering the drug Haldol to him on that morning. In support of his claim, he points to the testimony of Dr. Syphax that it would have been inappropriate to give him Haldol on the morning of June 16 if he had been quietly sleeping the

night before. He also points to a similar statement at deposition by Dr. Alan Heine, and to Dr. Heine's further statement that Haldol can cause a patient to become unsteady on his feet.

Once again, defendant counters by pointing out that plaintiff has introduced no expert testimony on lack of supervision with respect to this fall. As to the doctors' statements on the administration of Haldol to plaintiff, they are premised on the assumption that plaintiff was quietly sleeping the night before, whereas plaintiff himself testified that he was extremely anxious during that night. More importantly, plaintiff has produced no testimony that the administration of Haldol to plaintiff on the morning of June 16 was in fact the cause of his fall in the ward. Plaintiff himself remembers nothing of the incident, and Dr. Heine's statements that Haldol could cause unsteadiness were premised on two medical contingencies that were not present here. Accordingly, the Court finds that plaintiff has not shown by a preponderance of the evidence

that defendant was negligent with respect to the fall in the ward.

III. PLAINTIFF HAS NOT ESTABLISHED DEFENDANT'S NEGLIGENCE FOR HIS NECK FRACTURE.

The most significant injury which plaintiff claims is a fracture to the "C-1" vertebra in his neck, an injury which he alleges was incurred in a wheelchair accident at St. Elizabeth's. Specifically, plaintiff claims that he was strapped into a wheelchair on the morning of June 16, 1980 and pushed down a covered walkway by two Hospital attendants. He testified that while the wheelchair was moving quickly down an incline, it hit a protrusion in the walkway, and flipped completely over. Plaintiff stated that the top right quadrant of his head hit the ground as the chair flipped over, and he maintains that he thus sustained the fracture to his neck.

In response, defendant argues first that plaintiff's testimony is inherently incredible. As was revealed on cross examination, plaintiff on

prior occasions gave substantially different accounts of how he incurred the neck fracture. At one time, he said he incurred it when he rammed his head against a door, while under the influence of PCP. At another time, he said he incurred the fracture while doing exercises at St. Elizabeth's. Plaintiff has also given varying accounts of when the alleged wheelchair accident itself occurred, and he testified, somewhat incredibly, that he said nothing to the two Hospital attendants after the accident occurred. It is also clear from the record that plaintiff was in a psychotic state during his first few days at the Hospital, and he testified himself that his memory of the events that occurred is somewhat hazy. In light of all of these things, the Court must agree with defendant that plaintiff's otherwise unsupported story about this wheelchair accident is incredible, and find that this accident did not occur.

To be sure, even if the Court were to find that the accident did occur (which it does not),

the Court has no expert evidence from plaintiff establishing that the accident could or did cause the type of neck fracture plaintiff incurred. Plaintiff proposed to put on an expert witness to this effect prior to the close of his case, but failed to do so at the time scheduled for this testimony. Instead, plaintiff merely introduced several written articles on the subject of neck fractures, which defendant had already rebutted prior to trial with an affidavit from Dr. Bruce Ammerman. Also critical for plaintiff on the question of causation was his own testimony as to the point of impact on his head. Plaintiff's trial testimony on this was, like his testimony about the entire wheelchair incident, at variance with prior statements he had made. Without proof of the critical element of causation, there can be no liability for negligence. **Logsdon v. Baker**, 517 F. 2d 174 (D.C. Cir. 1975) (per curiam); **Hicks v. United States**, 511 F. 2d 407 (D.C. Cir. 1975). Thus, the Court finds

that plaintiff has not shown by a preponderance of the evidence that the accident he alleges to have occurred was the cause of the fracture to his neck.

IV. PLAINTIFF CANNOT RECOVER FOR HIS NECK FRACTURE UNDER THE DOCTRINE OF RES IPSA LOQUITUR.

Plaintiff has also attempted to demonstrate defendant's responsibility for his neck fracture through the doctrine of **res ipsa loquitur.** Under this doctrine, plaintiff must show that his injury (1) ordinarily would not have occurred in the absence of some negligence, (2) was caused by an agency or instrumentality within the exclusive control of defendant, and (3) is not due to any voluntary action or contribution on his part. **Quin v. George Washington University,** 407 A. 2d 580 (D.C. App. 1979). Plaintiff contends that his neck fracture ordinarily would not have occurred in the absence of some negligence, that he was within the exclusive control of defendant at the time it occurred, and that there is no evidence it was caused by his own voluntary action. In support of his

contention that the injury occurred while he was at St. Elizabeth's, plaintiff relies on his Hospital records, which reflect none of the symptoms of a neck fracture prior to the morning of June 16, 1980, yet repeated complaints of those symptoms at all times thereafter.

Defendant retorts that plaintiff has not persuasively established the time and place of the injury. It notes that plaintiff offered to present expert testimony that the injury occurred at St. Elizabeth's, but then never produced the expert. If the time and place of the injury are not established, however, plaintiff cannot show that the injury occurred while he was in defendant's exclusive control. It may have occurred before he came to the Hospital, perhaps as much as two months before, when he rammed his head into a door and was then beaten by police. Defendant also correctly notes that plaintiff needs expert testimony to establish that his fracture would not have occurred in the absence of negligence, since the fracture was of a

somewhat rare kind, not clearly within lay ken. **See Quin, supra.** Third, it is not completely clear that plaintiff did not contribute to the injury, inasmuch as he stated at one time that he incurred the injury while doing exercises at St. Elizabeth's. Accordingly, the Court finds that plaintiff has not shown that he is entitled to relief under the doctrine of **res ipsa loquitur.**

V. PLAINTIFF HAS NOT ESTABLISHED A NEGLIGENT FAILURE TO DIAGNOSE BY DEFENDANT.

Finally, plaintiff alleges that defendant negligently failed to diagnose his neck fracture during the course of his confinement at St. Elizabeth's, thus compounding the injury to his neck. He alleges that he repeatedly complained of all the symptoms of such a fracture starting on the afternoon of June 16, 1980 and continuing until he was discharged from the Hospital. Nonetheless, his fracture was not properly diagnosed until he went to the Washington Hospital Center on June 30, 1980.

Once again, defendant counters that plaintiff has not established the applicable standard of care for negligent diagnosis through the necessary expert testimony. **See Haven, supra.** Plaintiff offered to do so, but then did not. Defendant also reiterates that the time of the injury has not been persuasively established. Moreover, there was testimony that the symptoms plaintiff exhibited at St. Elizabeth's were explainable as side effects from the drug Haldol, rather than simply and unequivocably suggesting neck fracture. Accordingly, the Court finds that plaintiff has failed to show by a preponderance of the evidence that defendant negligently failed to diagnose a neck fracture.

VI. CONCLUSION

For all of the foregoing reasons, the Court shall enter an Order, of even date herewith, granting defendant's motion to dismiss under Fed. R. Civ. P. 41(b).

/S/ CHARLES R. RICHEY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DENNY JENKINS,	:	
Plaintiff,	:	
v.	:	Civil Action
UNITED STATES OF AMERICA,	:	No. 82-1082
Defendant.	:	

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is, by the Court, this 28 day of April, 1983,

ORDERED, that defendant's motion under Fed. R. Div. P. 41(b) is granted, and it is

FURTHER ORDERED, that this case is hereby dismissed.

/S/ CHARLES R. RICHEY
United States District Judge

FILED: APRIL 28, 1983
Clerk, U.S. District Court
District of Columbia

Office-Supreme Court, U.S.
FILED
JAN 4 1985
ALEXANDER L. STEVAS
CLERK

No. 84-928

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ABBEY NURSING HOME, INC., and MAX A. STRAUSS,
Petitioners,

v.

ESTATE OF ALMA RICHARDSON, VERNEDA BENTLEY, ADMINISTRATRIX,
Respondent.

On Writ Of Certiorari To The Ohio Eighth District Court of Appeals

---

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NICHOLAS M. DEVITO, ESQUIRE
Estate of Alma Richardson,
Verneda Bentley, Administratrix

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QUESTIONS/ISSUES PRESENTED FOR REVIEW

1. It is *not* a violation of Article VI, Cl. 2, the "Supremacy Clause" of the United States Constitution, when the Ohio Department of Welfare and/or the Cuyahoga County Welfare Department is not joined as a party in a civil action and the facts indicate that there was no right of subrogation.

2. Petitioners are *not* entitled to certiorari because there is absolutely *no* proof of any alleged violation of the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

3. Petitioners are *not* entitled to certiorari because there is absolutely no proof of any alleged violation of petitioners' liberty interest.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CITATIONS OF OPINIONS AND JUDGMENTS RENDERED IN THE COURTS BELOW

A. Order denying Motion to Certify in the Supreme Court of Ohio, Case No. 84-711. (See Appendix, Exhibit A.)

B. Order denying Motion for Rehearing in the Supreme Court, Ohio Supreme Court Case No. 84-264, May 23, 1984. (See Appendix, Exhibit B.)

C. Order and Opinion denying Motion in Support of Jurisdiction in the Supreme Court of Ohio, Ohio Supreme Court Case No. 84-264, April 18, 1984. (See Appendix, Exhibit C.)

D. Order and Opinion denying Motion to Certify in Court of Appeals, Case No. 46126. (See Appendix, Exhibit D.)

E. Order and Opinion affirming trial court judgment, Ohio Court of Appeals, Eighth Appellate District, Case No. 4626. (See Appendix, Exhibit E.)

F. Order rendering judgment upon verdict after Remittitur, Cuyahoga County, Ohio Court of Common Pleas, Case No. 988159. (See Appendix, Exhibit F.)

G. Order granting Motion for Remittitur in Cuyahoga County, Ohio Court of Common Pleas, Case No. 988159. (See Appendix, Exhibit G.)

H. Order rendering judgment in accordance with jury verdict, in second trial, Cuyahoga County, Ohio Court of Common Pleas, Case No. 988159. (See Appendix, Exhibit H.)

I. Order denying Motion to Certify in Supreme Court of Ohio, Ohio Supreme Court Case No. 81-1453. (See Appendix, Exhibit J.)

J. Order denying Motion to Certify in Supreme Court of Ohio, Ohio Supreme Court Case No. 81-1454. (See Appendix, Exhibit L.)

K. Order denying Motion to Certify, Ohio Court of Appeals, Eighth Appellate District, Case Nos. 42156 and 42168. (See Appendix, Exhibit N.)

L. Order and Opinion remanding original trial court judgment, Ohio Court of Appeals, Eighth Appellate District, Case Nos. 42156 and 42168. (See Appendix, Exhibit O).

M. Order entering judgment upon verdict at first trial in Cuyahoga County, Ohio Court of Common Pleas, Case No. 988159. (See Appendix, Exhibit P.)

JURISDICTIONAL STATEMENT

Petitioners erroneously allege and request this Honorable Court to invoke jurisdiction pursuant to 28 U.S.C. Section 1257(3), which reads in pertinent part:

> By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute, is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

Respondent contends that the petitioners have failed to present a claim which warrants the invocation or confers upon this Supreme Court, the jurisdictional requisite and right to review and/or grant certiorari. Wherefore, the judgment of the lower court must stand, and petitioners' request for Writ of Certiorari denied.

ALLEGED CONSTITUTIONAL PROVISION INVOLVED

Respondent further contends that the petitioners have failed to present to this Court any facts which

constitute violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution; nor any violation of the Supremacy Clause.

STATEMENT OF THE CASE

This case came to be heard in the Common Pleas Court of Cuyahoga County, Ohio, upon an action instituted by the Administratrix of the Estate of Alma Richardson (Richardson) against, *inter alia*, Abbey Nursing Home, Inc. (Abbey) and Max A. Strauss for negligence in the care and protection that they provided for decedent.

In the first trial, a jury verdict in the amount of Three Thousand One Hundred Eighty-eight Dollars ($3,188.00) was returned against said defendants (See Appendix, Ex. P) after three (3) weeks of testimony and evidence introduced at the trial court. Subsequently, both plaintiff and defendants, Abbey and Max A. Strauss, appealed from said judgment, respectively Case Nos. 42156 and 42168. Both appeals resulted from the same lower court trial; consequently, the Court of Appeals of Cuyahoga County, Ohio, Eighth Appellate District consolidated said appeals, reversed the trial court and remanded the within action for a new trial. (See Appendix, Ex. O.) *Inter alia*, said Ohio Court of Appeals held that there was sufficient evidence introduced at trial to render the issue of punitive damages a jury question; and that it was error for the trial court to refuse such an instruction.

In July, 1982, the action was retried before the Honorable George J. McMonagle, in the Court of Common Pleas, Cuyahoga County, Ohio, and on July 22,

1982, the jury rendered a verdict in favor of plaintiff-respondent in the sum of Seventy Five Thousand Dollars ($75,000.00) in compensatory damages and Three Hundred Thousand Dollars ($300,000.00) in punitive damages against defendants-petitioners Abbey Nursing Home, Inc., and Max A. Strauss (See Appendix, Ex. H). Subsequently, defendants-petitioners timely filed a Motion for New Trial or, in the alternative, a Motion for Judgment Notwithstanding the Verdict and a Motion for a Remittitur. The trial court found Defendants' Motion for a Remittitur to be well taken and determined that the judgment with respect to punitive damages was excessive by One Hundred Twenty-five Thousand Dollars ($125,000.00) although not the result of passion and prejudice (See Appendix, Ex. G). Plaintiff consented to the remittitur; consequently, defendants' Motion for New Trial and for Judgment Notwithstanding the Verdict were overruled and judgment was entered in the amount of Seventy-five Thousand Dollars ($75,000.00) in compensatory damages and One Hundred Seventy-five Thousand Dollars ($175,000.00) in punitive damages (See Appendix, Ex. F).

Subsequently, defendants-petitioners appealed from the judgment rendered in the second trial (said appeal was filed with the Eighth Appellate District, Ohio Court of Appeals; and assigned Case No. 46126). In its decision announced December 8, 1983, said Appeals Court affirmed the judgment against defendants, Abbey Nursing Home, Inc., and Max Strauss, in the amount of Seventy-five Thousand Dollars ($75,000.00) in compensatory damages, and One Hundred Seventy-five Thousand Dollars ($175,000.00) in punitive damages. (See Appendix, Ex. E.)

In January, 1984, the defendants-petitioners then filed a Notice of Appeal to the Supreme Court of Ohio. That action was assigned Ohio Supreme Court Case No. 84-264. In April, 1984, the Ohio Supreme Court denied petitioners' Motion in Support of Jurisdiction (See Appendix, Ex. C). In May, 1984, the Ohio Supreme Court denied petitioners' Motion for Rehearing (See Appendix, Ex. B), and on or about July 17, 1984, the appellants-petitioners caused to be docketed with this Court their Petition for Writ of Certiorari; said action was assigned Case No. 84-103. On or about October 1, 1984, this Court denied petitioners' writ. In addition to the procedural posture set forth above, several Motions were filed with the Eighth Appellate District Court of Appeals of Ohio, in January, 1984. In its Opinion and Judgment Entry of March 6, 1984 (See Appendix, Ex. D), said Court of Appeals denied appellants' Motion to Certify, denied appellants' Motion for Consideration EN BANC, denied appellee's Motion to tax costs and CLARIFIED the decision and opinion announced December 8, 1983. Whereby, appellants then filed a Notice of Appeal from the March 6, 1984 decision and Brief in Support of Jurisdiction with the Supreme Court of Ohio, Ohio Supreme Court Case No. 84-711. The Supreme Court of Ohio denied petitioners' Motion to Certify in Case No. 84-711 (See Appendix, Ex. A).

On December 7, 1984, petitioners filed their Petition for Writ of Certiorari and commenced the foregoing action. This Brief is in response to said petition.

STATEMENT OF FACTS

On February 3, 1978, Alma Richardson was admitted to Abbey Nursing Home. She was admitted to

Abbey Nursing Home directly from University Hospital of Cleveland, where she had been hospitalized. She was transported from University Hospital to Abbey Nursing Home by an ambulance and was carried into Abbey on a stretcher. At the time Alma Richardson was admitted to Abbey Nursing Home, she was sixty-four (64) years old and very obese, weighing well over two hundred (200) pounds. Not only was Alma Richardson suffering from hypertension, but more importantly, she was suffering from the residuals of prior brain surgery and prior strokes which left her paralyzed and completely helpless. Further, she had been diagnosed as having organic heart disease which required regular medication. The results of the strokes and prior brain surgery were that Alma Richardson was a double incontinent and suffered from left hemiplegia or total paralysis of the left side of her body. Evidence at trial, including the admissions by Max Strauss, the owner/operator of Abbey and the original admission records of Abbey indicated that Abbey Nursing Home was aware of these conditions and diagnosed Alma Richardson as needing total care and being completely unable to feed or care for herself. Finally, despite these numerous and severe health problems, the evidence at trial, including the admissions of Max Strauss and the admissions records of Abbey Nursing Home, indicated that Alma Richardson's skin was in very good condition with no broken areas or irritations.[1]

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[1] Said facts are stated in the July 9, 1981 decision rendered by the Eighth District Court of Appeals; See Appendix, Ex. I. *See also* Exhibit 52, Chart of Alma Richardson while at Abbey Nursing Home, especially admission records and exam.

During the stay of Alma Richardson in Abbey Nursing Home, it was extremely over-crowded with patients; there was constant noise, crying and screaming of patients needing aid; there was a lack of professional staff, especially nurses; there was inadequate supervision of the staff on duty, some of whom engaged in sexual acts when they were supposed to be on duty caring for patients; and, the entire nursing home was kept in an unclean and unsanitary condition with the constant stench of urine and feces throughout the home.[2] Abbey Nursing Home formulated no coordinated patient-care plan for Alma Richardson; it paid insufficient attention to her dietary needs; and it formulated no physical therapy service plan for Alma Richardson.[3] The evidence at trial showed that Alma Richardson, who was totally incapable of defending herself in any way, was verbally and physically abused by members of the staff of Abbey Nursing Home and physically and sexually abused by both male and female patients (sodomy and lesbianism). Moreover, she was not fed properly, nor was she kept clean, given regular baths, regular medication or moved regularly.[4]

On June 19, 1978, Alma Richardson was withdrawn from Abbey Nursing Home by her daughter and granddaughter. She was transported to University Hospital in an ambulance. The Emergency room records of University Hospital and the testimony of Dr.

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[2] *See,* Transcript, direct testimony of Sr. Catherine Cassidy, pp. 1329 to 1332, 1339, 1388 and 1389 and Appendix, Ex. I.

[3] *See,* Exhibit 52, *Ibid.* and Appendix, Ex. I.

[4] *See,* Exhibit 52, *Ibid.* and transcript, direct testimony of Verneda Bentley, pp. 1115 to 1119 and Appendix, Ex. I.

Donald Bruce Goodfellow, the treating physician in the emergency room indicated that Alma Richardson was treated for one inch by three inch (1″ x 3″) abrasions on her left posterior thigh, which were approximately four (4) days to one (1) week old. The physician ordered an X-ray to determine if her left shoulder was fractured or broken. Although Alma Richardson's left shoulder was neither broken nor fractured, there was a very large black and blue bruised area on her left biceps (ecchymoma), her shoulder motion was very limited, and she was suffering from soft tissue trauma in this area. Further, she was suffering from a *severe rash* under her left breast.[5]

The testimony of Verneda Bentley indicated that at the time Alma Richardson was taken to the emergency room, her back and buttocks were also bruised, and there were open cuts on her back. Also, Alma Richardson's face was swollen and puffed as if she had been beaten.[6] These injuries led to investigation by the University Hospital Social Worker, Walter Drummond, since they could not possibly have been self-inflicted by a paralyzed Alma Richardson. Because of the unusual and suspect injuries, Dr. Goodfellow filled out and signed a complaint form which was forwarded to the Cuyahoga County Welfare Dpartment.[7] In ad-

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[5] *See*, Exhibit 32, University Hospital Emergency Room Report and Appendix, Ex. M.

[6] *See*, Transcript, direct testimony of Verneda Bentley, pp. 1131 to 1134, 1148 and Exhibits 18, 19, 20, 21 and 22 and Appendix, Ex. M.

[7] *See*, Transcript, direct testimony of Walter Drummond at pp. 654 and 662 and Appendix, Ex. M.

dition to the aforementioned injuries, Alma Richardson had a severe rash and open flesh area in the vicinity of her vagina as well as other lacerations, bruises and sores in other parts of her body. She was so filthy, she had to be washed by her granddaughter before the doctor could examine her.

ARGUMENT IN OPPOSITION TO CERTIORARI

1. It Is *Not* A Violation Of Article VI, Cl. 2, The "Supremacy Clause" Of The United States Constitution, When The Ohio Department Of Welfare And/Or The Cuyahoga County Welfare Departments Are Not Joined As A Party In A Civil Action And The Facts Indicate That There Was No Right To Subrogation.

Petitioners argument and alleged violation of the Supremacy Clause is totally without merit. The alleged right of subrogation referred to by petitioners does not apply in this action because *respondent did not seek to recover any money paid to Abbey Nursing Home by either the Ohio or Cuyahoga County Welfare Departments.* Section 5101.58, Ohio Revised Code, reads in pertinent part:

> No settlement, compromise, judgment or award or any recovery in any action or claim by a recipient *where the departments have a right of subrogation* shall be made final without first giving the appropriate departments notice and a reasonable opportunity to perfect their rights of subrogation (emphasis added).

Based upon the controlling Ohio law, and upon review of the uncontroverted facts in the case at bar, the Court of Appeals, for the Eighth Appellate District (Cuyahoga County, Ohio) held, at page 11, ". . .

[a]ny expenses or damages claimed in this suit were only those suffered directly by plaintiff. As a result, the Ohio Department of Welfare has no right to subrogation."[8] Thus, petitioners' argument hereunder is without merit.

2. Petitioners Are *Not* Entitled To Certiorari Because There Is Absolutely No Proof Of Any Alleged Violation Of The Due Process And/Or Equal Protection Clauses Of The Fourteenth Amendment To The United States Constitution.

Once again, *petitioners* erroneously argue that they have been denied due process and equal protection under the laws. The Supreme Court of Ohio found absolutely *NO* such violation and the Ohio Court of Appeals found *NO* violation.[9] Respondent respectfully urges this Court to also find there were no violations; petitioners have received full, fair and complete equal protection and due process under the laws of our land.

Petitioners' opportunities to make a record of the trial court proceedings were often and many. Petitioners' opportunities to make proffers for the record were *unlimited* by the trial court. As a matter of judicial economy and within the discretion of the lower court, the lower court had some conversations with both counsel "off-the-record."

Respondent submits that if the substance of "off-the-record" conversation and/or proceedings were of such importance, then defense counsel should have pursued other available options in order to present such matters to the Court of Appeals for review. App.

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[8] *See* Appendix, Exhibit E.

[9] *See* Appendix, Exhibits A, D and E.

R. 9(C), Ohio Rules of Appellate Procedure, permits an appellant (i.e., petitioner) to submit a narrative transcript of the proceedings when a *verbatim* transcript is unavailable. App. R. 9(D) authorizes parties to submit an agreed statement of the case in lieu of the record. App. R. 9(E) states:

> * * * If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted.

See also, Knapp v. *Edwards Laboratories,* 61 Ohio St.2d 197 (1980).

The trial court *correctly* followed the controlling case law and did *not* require respondent to present expert testimony. The trial court and Eighth District Court of Appeals correctly followed the holdings in *Estate of Alma Richardson* v. *Abbey Nursing Home, Inc.* (decided July 9, 1981), *supra,*[10] and *Jones* v. *Hawkes Hospital of Mt. Carmel,* 175 Ohio St. 503 (1964).

In the foregoing action, respondent sought recovery for the negligence of a nursing home in allowing (and failing to prevent) a partially paralyzed and incontinent woman from: suffering bruises, diaper rash, sitting in her own stools and smelling so foul from neglect so as to offend anyone who came in contact with her,

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[10] *See* Appendix, Exhibit O.

including the emergency room physician at University Hospital on June 19, 1978.

The Court of Appeals correctly held that these are matters of common knowledge. The Court held, at page 4:[11]

> *The evidence in this case was of gross, deplorable conditions, total lack of supervision and both abuse and neglect of plaintiff. Expert testimony is not required where the matter is one of common knowledge . . . This assignment of error lacks merit.*

Petitioners incorrectly argue that they were excluded from offering testimony to establish that Abbey Nursing Home employee, Evelyn Brooks, enjoyed a good reputation for "peace and good order." Evid. R. 404, Ohio Rules of Evidence, excludes evidence of a person's character in civil cases for the purpose of proving that he acted in conformity with that character on a particular occasion unless the evidence concerns the character trait of truthfulness admitted on the issue of credibility. There are exceptions to this general rule; however, *respondent never offered testimony that Evelyn Brooks had a bad reputation for the character trait of "peace and good order."* Respondent's testimony was limited to accounts where Evelyn Brooks' actions at the nursing home were witnessed and related to the jury. The issue in the instant case concerned the *custodial care and treatment of Alma Richardson while a patient at Abbey Nursing Home.*

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[11] *See* Appendix, Exhibit E. This issue is discussed in greater detail at subsection 3 herein.

With respect to liability, the only issue presented to the jury for its determination was simple negligence.[12] Therefore, the issue raised by petitioners regarding this issue is wholly without merit.

The charge to the jury on the issue of punitive damages was just and proper. A review of the evidence presented at trial shows:

> On February 3, 1978, Alma Richardson was admitted to Abbey. *She was partially paralyzed from several strokes, could not feed herself and was incontinent.*
>
> On June 19, 1978, she was taken by ambulance to University Hospital. *The family was asked to wash her before the doctor would examine her.* Dr. Goodfellow observed a large bruise on her left arm, abrasions on her thigh, and a diaper-like rash under her breasts. Bruises were also observed on her buttocks.
>
> *Conditions at Abbey were deplorable. Bed linens were dirty,* patients were tied to chairs with bed sheets, patients were *sitting in their waste.* The utensils were dirty. *Cockroaches* were prevalent, *rats* were in the building, and flies were in the food.
>
> *As to Alma Richardson, she was seen sitting in her own stool, had the dirt, bruises and diaper rash previously discussed.* Also, two patients, a male and a female, attempted to sexually abuse her. There was evidence she had been struck. On one occasion, she fell from a potty chair and suffered bruises and lacerations.[13]

---

[12] *See* Appendix, Exhibit I, Tr. p. 2138.

[13] *See* Appendix, Exhibit E.

Ohio case law consistently indicates that when the facts show that a defendant has acted in a *callous and cavalier manner,* it is a question of fact for the jury to determine if such acts were willful and wanton and sufficient to award plaintiff punitive damages. Furthermore, Ohio courts have held that malice ". . . may be inferred from conduct and surrounding circumstances." *Columbus Finance Co.* v. *Howard,* 42 Ohio St.2d 178, 327 N.E.2d 654, 658 (1975); citing *Davis* v. *Tunnison,* 168 Ohio St.471, 155 N.E.2d 904 (1959); *Gearhart* v. *Angeloff,* 17 Ohio App.2d 143 (1969).

Taking into consideration the conduct and circumstances at Abbey Nursing Home while Alma Richardson was under their care, the Eighth Circuit Court of Appeals held, at page 20:

> Abbey's actions were intentional and deliberate from the point that they were unable to deal with or solve the multitude of problems with which they were confronted. However, they continued to accept incontinent, bedridden, helpless patients well knowing they could not provide a decent quality of care.
>
> It can only be considered the utmost of greed that a provider would accept patients knowing they did not have proper facilities and could not give them care. *Abbey's conduct was outrageous* (emphasis added).

Furthermore, at page 23, it was held:

> Punitive damages may be awarded where the evidence demonstrates "wanton, willful, and gross acts" which support the conclusion of reckless indifference on the part of Abbey.

> *The record supports the above as well as outrageous conduct and insult*[14] (emphasis added).

Therefore, proving that the jury was correctly charged on the issue of punitive damages; and, that petitioners were *NOT* deprived of *any* due process or equal protection of the laws.

3. Petitioners Are *Not* Entitled To Certiorari Because There Is Absolutely *No* Proof Of Any Alleged Violation Of Petitioners' Liberty Interest.

In addition to those arguments and law previously discussed herein regarding the issue of expert testimony, respondent further states that the law in Ohio is clear that expert testimony is *not required* where the subject matter of inquiry is within the common knowledge of the jury. The issue of whether expert testimony is needed to establish the standards in the nursing home industry or nursing profession was addressed by the Court of Appeals in the first appeal of this action.[15] That Court held, *inter alia,* that expert opinion testimony was *not* necessary in the instant case. The Court stated as follows:

> Even if experts had testified to the usual and customary care given by a nursing home, "it is entirely possible . . . that what is usual and customary [in the nursing home industry] may itself be negligence." *Stogsdill* v. *Manor Convalescent Home* (1976), 35 Ill. App. 3d 634, 662, 343 N.E.2d 589, 610.
>
> The logic in support of a "reasonable care" standard is persuasive for a service facility which

---

[14] *See* Appendix, Exhibit E.

[15] *See* Appendix, Exhibit O.

> is essentially custodial. *Decedent's medical care while at the defendant institution is not a major issue in this case. Her care, as a human being needing protection, is.* (Opinion at 11.)

The testimony at the trial court level in no way evidenced any fact or circumstance which challenged the competency of the nurses in their professional capacity at Abbey Nursing Home. Hence, the appellate court determined the appropriate standard to be that of "reasonable care" where the facts presented no allegation or challenge to the professional competence of the nurses at Abbey.

Consequently, this determination of reasonable care negated the necessity of expert testimony as an aid to the jury in their determination of whether defendants were *negligent in the custodial care and protection afforded decedent.* In fact, it would have been an usurpation of the jury's function to admit such testimony. In *Bahamas Agr. Industries, Ltd.* v. *Riley Stoker Corp.*, 526 F.2d 1174 (1975), the Court adhered to the rule in Ohio that expert testimony is not a prerequisite in every case to determine a standard of care.

> The Supreme Court of Ohio has declared that there is no general rule or policy in Ohio which requires expert testimony as to the standard of care in a particular case. *Bahamas* at 1178, citing *Thompson* v. *Ohio Fuel Gas Co.*, 9 Ohio St.2d 116, 224 N.E.2d 131 (1967).

Further, in *Jones* v. *Hawkes Hospital of Mt. Carmel,* 175 Ohio St.503 (1964), the Court limited the competence of expert opinion evidence:

> Broadly speaking, expert opinion evidence is admissible only where the inquiry involves a question of science or art, or of a professional or mechanical skill, and is incompetent where the matter of inquiry is within the common knowledge of average general information . . . The jury, unaided by the opinion of experts, was sufficiently equipped with knowledge gained from everyday life to consider the facts and to return a verdict supported by competent evidence of proof of negligence proximately causing appellant's injuries. *Jones* at 506, 507.

Expert opinion evidence was neither necessary nor competent as an aid in the jury's determination in the instant case. As stated by the appellate court, the decedent's *"care, as a human being needing protection,"* was the negligence issue before the jury.

The standard of care for nursing homes in Ohio has not been established by the legislature nor by judicial precedent. Nevertheless, it is clear in Ohio that "reasonable care" is the proper standard when such voids exist. The duty of petitioners alleged to have been breached was that of reasonable care in the *custodial care and protection* of decedent. Consequently, the negligence complained of was well within the ambit of ordinary, simple negligence. Wherefore, the petitioners' arguments regarding this issue are not well taken.

CONCLUSION

Wherefore, based upon the law and arguments set forth herein, respondent respectfully requests this Court to find petitioners' arguments are not well taken; and, therefore, certiorari must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nicholas M. DeVito, Counsel for Respondent, Estate of Alma Richardson, Verneda Bentley, Administratrix, and a member of the Bar of the Supreme Court of the United States, certify that on January 4, 1985, I served three (3) copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari on Aubrey B. Willacy, Esquire, Attorney for Petitioners, by regular U.S. Mail, First Class, addressed to: Aubrey B. Willacy, Esquire, 700 Western Reserve Building, 1468 West Ninth Street, Cleveland, Ohio 44113.

/s/ N. M. DeVito
Nicholas M. DeVito, Esq.
Attorney for Respondent

Office - Supreme Court, U.S.
FILED
JAN 25 1985
ALEXANDER L. STEVAS,
CLERK

(4)

No. 84-928

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ABBEY NURSING HOME, INC.,
AND MAX A. STRAUSS,

PETITIONERS

-vs-

ESTATE OF ALMA RICHARDSON,
VERNEDA BENTLEY, ADMINISTRATRIX,

RESPONDENT

ON WRIT OF CERTIORARI
TO THE OHIO EIGHT DISTRICT
COURT OF APPEALS

PETITIONER'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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REPLY

A. Is it a violation of Article VI, Cl. 2, the "Supremacy Clause" of the Constitution of the United States, for a state, through its courts, to refuse to enforce Federal statutory law, specifically the subrogation provisions of 42 U.S.C. §1396a(a)(25)(C), found in Title XIX of the Social Security Act, by refusing to give effect to the state statute carrying out the requirements of Federal law, in this case O.R.C. §5101.58?

In her argument in opposition to certiorari, respondent concedes the validity of the constitutional issue raised therein. She only challenges the underlying factual basis for the reason for granting the writ by stating, at p. 10 of her brief:

> Petitioners argument and alleged violation of the Supremacy Clause is totally without merit. The alleged right of subrogation referred to by petitioners does not apply in this action because **respondent did not seek to recover any money paid to Abbey Nursing Home by either the Ohio or Cuyahoga County Welfare Departments.** [Emphasis in the original.]

The foregoing is an incorrect statement of the issue raised by petitioners for two reasons. **First**, petitioners asserted, at pp. 8 and 22 of their Petition, that 42 U.S.C. §1396a(a)(25)(C) and O.R.C. §5101.58 were violated because Medicaid funds paid for certain health care expenses allegedly necessitated by her decedent's claimed injuries, which respondent included in her claim for recovery. While respondent may not have sought recovery for Medicaid funds paid to petitioner Abbey Nursing Home, she **did** seek damages for expenses paid in **her** behalf by Medicaid.

Second, the record in this case establishes the foregoing facts through respondent's **own admission** on direct testimony at the first trial of this

action. (**See**, testimony of Verneda Bentley on direct examination, at pp. 890-891 and 893-896 of the Transcript of Proceedings of the First Trial herein, reproduced in the Appendix hereto at pp. 15 to 20.) Thus, the facts in this case do demonstrate that the courts of Ohio have failed to enforce the applicable subrogation provisions of 42 U.S.C. §1396a(a)(25) and O.R.C. §5101.58, thereby prejudicing petitioners by exposing them to the risk of double recovery against them for the amount paid by Medicaid.

B. Is it a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and, therefore, a denial of Due Process and of Equal Protection of the laws for the courts of a state, in a civil case, to deny a party thereto the benefit of those well-settled statutory and common law rules

governing substantive proof and trial procedure which are ordinarily and regularly applied in similar disputes before such courts?

Again, respondent raises no opposition to petitioners' central constitutional issue that the denial to a party, in a civil action in a state court, of the benefit of well-settled statutory and common law rules governing proof and procedure, constitutes a violation of the Due Process and Equal Protection guarantees of the Fourteenth Amendment. Rather, respondent's opposition is an attempt to rebut five out of the eight deprivations so listed on pp. 32-33 of the Petition. If the courts of Ohio did, in fact, deprive petitioners of their right to have their case tried under the same rules as all other litigants, then the validity of this reason for granting the writ is also conceded by respondent. And, in fact, petitioners were deprived of the benefits of those rules.

Respondent, at p. 11 of her brief, suggests that no error occurred as a result of the trial court's refusal to permit a verbatim stenographic record to be made of all of the trial proceedings, thus depriving petitioners of their right to obtain effective appellate review. Respondent predicates this contention upon Ohio App. R. 9, as allegedly interpreted by the Ohio Supreme Court in **Knapp v. Edwards Laboratories**, 61 Ohio St. 2d 197 (1980). That case, however, is no authority for the rule which respondent insists is the correct one. Rather, **Knapp** involves a bizarre fact pattern, wherein the trial court permitted a full verbatim stenographic record to be made but, after the trial, a combination of the illness of the court reporter and the mental instability of the trial judge [which led to his removal from the bench -- **see, Ohio State Bar Ass'n. v. Mayer**, 54 Ohio St. 2d 431 (1978)], prevented a **transcription** of that record which was, in fact, made.

The rule in Ohio is set forth in a statute, R.C. §2301.20, which provides:

> Upon the trial of a case in the court of common pleas, if either party to the suit, or his attorney, requests the services of a shorthand reporter, the trial judge shall grant the request, or such judge may order a full report of the testimony or other proceedings, in which case such shorthand reporter shall take accurate shorthand notes of the oral testimony or other oral proceedings, which notes shall be filed in the office of the official shorthand reporter and carefully preserved.

This statute has repeatedly been held by the courts of Ohio to require that a stenographic record of **all** trial proceedings be afforded to a party where, as here, it has been timely requested. **White v. White**, 50 Ohio App. 2d 263, 268-269 (Cuyahoga 1977); **Combs v. Cardwell**, 472 F. 2d 1188, 68 Ohio Ops. 2d 243 (6th Cir. 1972); **University Hts. v. Dachman**, 33 Ohio App. 2d 314, 316 (Cuyahoga 1973); **State v. Mishne**, 93 Ohio L. Abs. 85, 92 (Geauga App. 1963). Petitioners herein were clearly deprived of this right.

Respondent insists, at pp. 12-13 of her brief, that Ohio law does not require expert proof — in a case involving allegations that a nursing home, acting through its staff of licensed administrators, licensed nurses, and nurses' aides and orderlies, was negligent in the discharge of its duties toward respondent's decedent -- of (a) the standard of care; (b) that the conduct of the health-care staff involved fell below that standard; and (c) that the claimed injuries of decedent were proximately caused by that breach. The law in Ohio, and as set down by this Court, is, of course, that such expert testimony is both required and permitted. **Bruni v. Tatsumi**, 46 Ohio St. 2d 127 (1976); **Ragone v. Vitali and Beltrami, Jr., Inc.**, 42 Ohio St. 2d 161, 173-174 (1975); **McKay Machine Co. v. Rodman**, 11 Ohio St. 2d 77 (1967); **McCrory v. State**, 67 Ohio St. 2d 99, 103 (1981); **Willett v. Rowekamp**, 134 Ohio St. 285 (1938); **Fleischmann Transportation Co. v. Bishop**, 12 Ohio App. 293, 294 (Hamilton 1919);

and **Youngberg v. Romeo**, 457 U.S. 307, 321-323 (1982).

Respondent then denies, at p. 13, that petitioners possessed the right to present evidence of one of their employee's reputation for peace and good order, after it was alleged that she assaulted respondent's decedent while in the course and scope of her employment, and, consequently, no deprivation of the right to present such evidence occurred. The rule in Ohio is that such evidence is admissible. **Lakes v. Buckeye Mutual Ins. Assn.**, 110 Ohio App. 115, 118 (Jackson 1959). Petitioners were, therefore, deprived of the benefit of the rule.

The next rule of law which respondent denies is in existence in Ohio, is one requiring expert testimony to establish negligence of the nursing home staff in the discharge of their various duties to her decedent and to proximately link this alleged negligence to said decedent's claimed damages. As shown above, this rule does exist, and

has existed since at least 1919. **Bruni; Ragone; McKay Machine Co.; McCrory; Willett; Fleischmann; Youngberg, all supra.**

Finally, respondent denies that petitioners were denied a charge to the jury on the issue of punitive damages that correctly incorporates Ohio law on the subject. The law in Ohio **is** that, in order to be held liable in punitive damages, a defendant's conduct must be proven to have been intentional and deliberate, or have the character of outrage frequently associated with crime. **Detling v. Chockley,** 70 Ohio St. 2d 134, 137-138 (1982). A review of the jury charge (which appears in the Appendix to the Petition in Exhibit E at the discussion of Assignment of Error No. XXXII), reveals that this rule was **not** applied in that charge. Therefore, petitioners were, in fact, deprived of the benefit and protection of the law by the courts of Ohio in this regard.

The remaining assertions of deprivation by petitioners, as well as the other such assertions raised below (**see** Appendix to the Petition, Exhibit E at the "Appendix to Case No. 46126"), were not contested by respondent. When viewed together, the pervasive and wholesale denial of Due Process of Law and the Equal Protection of the laws by the courts of Ohio becomes apparent. This reason, too, for granting **certiorari** is therefore well-taken.

C. Where this Court has decided that in cases seeking redress for alleged violations of an individual's liberty interest in safety in an institution supported by Federal funds, a decision regarding such safety, if made by a professional (which includes a person competent, whether by education, training or experience, to make the particular decision at issue) is presumptively valid, and liability may be imposed only when the decision by the professional is such a substantial departure

from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment, may a state court impose such liability without first requiring proof of (a) the accepted professional judgment, practice, or standard, and (b) the departure therefrom?

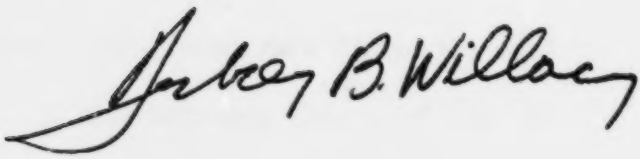
The cases cited by respondent at pp. 16-18 of her brief all predate this Court's 1982 decision in **Youngberg v. Romeo, supra.** Regardless of what the rule of law may have been as to the type and quantum of proof necessary to establish liability on the part of professional decision-makers (i.e., administrators, nurses, therapists, aides, etc.) in government-supported custodial care facilities, this Court has now determined that such persons are presumed to have acted validly until proof of a substantial departure from accepted professional

judgment (**i.e.**, expert testimony as to what "accepted professional judgment" is, and that the petitioners' judgment substantially departed therefrom) is adduced. Such standard is denied by respondent and, in fact, was not applied by the courts below, thus necessitating issuance of the requested writ of **certiorari** to insure uniformity of decisions on this Federal question.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in support of the Petition for **Certiorari**, petitioners respectfully request that the Writ of **Certiorari** prayed for be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Aubrey B. Willacy, Counsel for Petitioners, Abbey Nursing Home, Inc., and Max Strauss, and a member of the Bar of the Supreme Court of the United States, certify that on January 24th, 1985, I served three (3) copies of the foregoing Petitioners' Reply Brief and Supplemental Appendix on Counsel for Respondent, Nicholas M. DeVito, Esq., Nicholas M. DeVito & Associates, 1000 Terminal Tower, Cleveland, Ohio 44113.

Aubrey B. Willacy

Aubrey B. Willacy, Esq.

TRANSCRIPT OF RECORD OF FIRST TRIAL
IN COURT OF COMMON PLEAS, CASE NO. 988159,
CONTAINING THE DIRECT TESTIMONY OF
PLAINTIFF, VERNEDA BENTLEY

* * *

Q. Why don't you tell us what you had to do for her?

A. Starting from June 19, which was June 20th, I called Seeley Medical Company. I think this was the one company's name, and I informed them of the situation and I asked for a hospital bed, a hoyle lift, a lifter. That's what they used to be able to move her because she was heavy, and pottychairs, tables, medical tables, and I had an electric pump that ran 24 hours a day for her air mattress, and electric air mattress, sheepskin, clothes, gowns, because when I got her, all her gowns and everything had been —

MR. WILLACY: Objection.

A. — left.

THE COURT: Sustained.

A. — at the nursing home. She had to have -- I had to buy all white linens for the hospital bed because all her stuff had to be bleached and disinfected. I had to have the room painted. The carpet was taken out, a tile floor installed in order to keep the place clean. Oh, boy. So many things. I had to buy pads, chuck pads that we bought by the cases.

Q. Did she have to have a special kind of diet?

A. Everything, yes, I had to buy for her diet, everything was no salt. I had to get a blender because everything had to be blended.

Q. How about her food?

A. Yes. I purchased all her food, even when she went on an all liquid diet the last month, everything. I took care of all, everything.

Q. How long did your grandmother live with you in your home?

A. From June 21st of 1978 until April 1.

Q. Of what year?

A. Of 1979.

Q. Is that when she died?

A. Yes, at my home.

* * *

Q. What else did you have to get for your grandmother's care?

A. With that Ensure, I had to have a feeding tube and a syringe and the food was pumped into her through her nose. The hospital put in a special tube that was from her, from her nose down into her stomach, and I had to inject food. That was her food that had to be injected through her nose to her stomach.

MR. WILLACY: Move to strike, your Honor.

THE COURT: Overruled.

Q. Now, each time she went for a hospital visit, I think you testified she had to go by ambulance.

A. Yes.

Q. Do you know how much that cost?

A. $100 —

MR. WILLACY: Objection, your Honor.

THE COURT: She may answer.

A. $100 a trip.

Q. Do you know how many trips were made to the hospital?

A. Many trips.

Q. Many trips?

A. Many trips.

Q. And was it for the treatment of these particular injuries that we have been talking about that were in the pictures?

MR. WILLACY: Objection, your Honor.

THE COURT: Sustained.

Q. What were the treatments for?

MR. WILLACY: Objection.

THE COURT: She may answer.

A. For the treatment of those injuries and also her previous injuries.

Q. Who is your oldest daughter, Verneda?

A. Trava.

Q. How old is Trava?

A. She just turned 13, just turned 13 February 3rd.

Q. Did Trava visit her great-grandmother with you on several occasions at the nursing home?

A. Yes, on the average of four, five times a week, three or four, five times a week.

Q. And did Trava also help you in caring for your grandmother when she was in your home?

A. Yes, she did.

Q. What did Trava do?

A. Trava did — she helped clean her. She helped change her. She helped bathe her. She combed her hair. She helped clean up her room. She helped wash. She did everything from changing, turning her over in bed, to cleaning her, to everything, everything that I did.

Q. She helped feed her?

A. Yes, she did.

Q. What did the visiting nurse do when she came?

A. She would take her blood pressure and take her blood pressure, taking her blood pressure and her temperature.

Q. Was there any discussion from her about putting Alma in a nursing home?

MR. WILLACY: Objection

THE COURT: Sustained.

Q. Did Alma want to go back to a nursing home?

MR. WILLACY: Objection.

THE COURT: Sustained.

Q. Who paid for these trips and this Seeley equipment, the supplies? Who took care of that? Did you?

A. Yes, I did. I made the arrangements for everything to be taken care of.

Q. And everything that was necessary for your grandmother, you paid for it?

A. Yes, along with her Medicare, Medicaid, whatever.

* * *

p. 8806